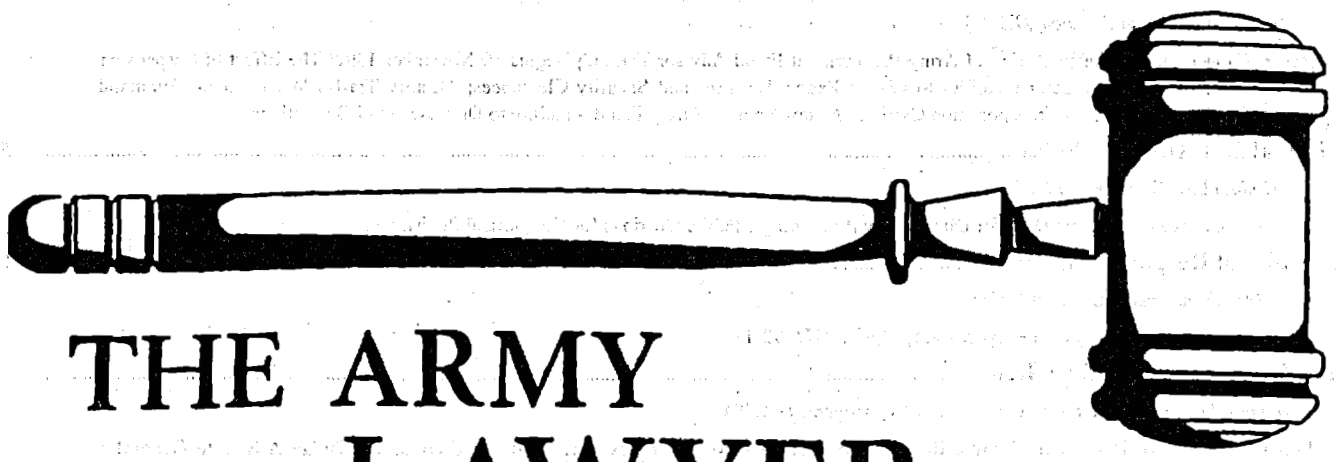

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Federal Agency Practice: Complying with Merit Systems Protection Board Interim Relief Orders

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Introduction

When an employee, or an applicant for employment, prevails in an appeal to the Merit Systems Protection Board (MSPB or Board), the administrative judge (AJ) normally will include in the decision an order instructing the agency to grant the appellant interim relief.[1] The Whistleblower Protection Act of 1989 (WPA) provides that an employee or applicant "shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review."[2] Although the language AJs commonly use in orders for interim relief appears unequivocal,[3] incidents of agency noncompliance with interim orders continue to occur at an alarming rate.[4]

On January 31, 1992, the Office of Personnel Management (OPM) promulgated new interim relief regulations. The regulations, which became effective March 2, 1992, authorize agencies to take various personnel actions necessary to comply with the requirements of the WPA.[5] Unfortunately, the historical tendency of federal agencies to disregard interim orders and the absence of any sign that the MSPB soon will promulgate new regulations of its own imply that OPM's new regulations will not eliminate the problem of agency noncompliance.

This article discusses the nature and scope of Board interim relief orders. It also describes the effects of noncompliance with a relief order and summarizes MSPB decisions that illustrate ways in which agencies frequently fail to comply with orders. The author concludes by offering suggestions to help agencies deal with common obstacles in complying with interim relief orders and by summarizing the OPM's new regulations.

Interim Relief Orders

Interim relief orders best may be understood by examining the scenario in which they most frequently occur—that is, when an AJ reverses an agency's removal of an employee from the federal service. When the AJ reverses the removal, he or she orders the agency to cancel the action, effective from the date the action originally occurred. Frequently, the AJ also will instruct the agency to substitute a lesser penalty—such as a thirty-day suspension—for the removal. Finally, if the agency files a petition for review, the AJ will order the agency to provide the appellant with interim relief in accordance with the WPA.[6]

Pursuant to the WPA, the MSPB has promulgated regulations that an agency must follow when filing a petition for review. In relevant part, these regulations provide that, if the initial decision granted interim relief, "any petition for review or cross petition for review filed by the agency must be accompanied by evidence that the agency has provided the

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[1] Interim relief describes personnel actions that an agency must initiate to benefit a successful appellant during the pendency of the agency's petition for review of an adverse initial decision. *See* 5 C.F.R. § 1201.111(c) (1992). The relief, defined by the AJ that issues the initial decision, must reflect the action appealed and the remedy sought by the appellant. *See id.* Interim relief may include, but is not limited to, interim appointments, within-grade pay increases, promotions, and demotions. An AJ need not order interim relief in every case. Before ordering interim relief, the AJ must determine that interim relief is appropriate, both in terms of the action appealed and the possible effects of the order on the parties. *See* 5 U.S.C. § 7701(b)(2)(A) (Supp. II 1990); 5 C.F.R. § 1201.111(c) (1992).

[2] Pub. L. No. 101-12, § 6, 103 Stat. 16, 33 (amending 5 U.S.C. § 7701(b) (1988)). The Act's interim relief provision protects both employees and agencies. The employee, as the prevailing party in the initial decision, receives relief from an agency action that an impartial factfinder found unwarranted. The agency, on the other hand, may decline to return the employee to his or her position during the pendency of the appeal if it believes that doing so would disrupt the workplace excessively. *See* 5 U.S.C. § 7701(b)(2)(a)(ii) (Supp. II 1990).

[3] *But see infra* text accompanying notes 46-47 (demonstrating that a reader unfamiliar with interim relief orders well may conclude that AJs' standard language is not clear at all).

[4] The author has found that the Board concludes in approximately six decisions each month that federal agencies which have submitted petitions for review have failed to comply with interim relief orders. This figure does not include resubmissions of petitions after errant agencies have corrected the deficiencies in their petitions for relief.

[5] The OPM published its final regulations on interim relief on January 31, 1992. *See* 57 Fed. Reg. 3707 (1992) (to be codified at 5 C.F.R. pts. 531, 536, 772, 831, 841, 842, 846, 870, 890).

[6] Any party to a proceeding may file a petition for review within 35 days after the initial decision is issued. 5 C.F.R. § 1201.114(a),(d) (1992). A petition for review is a request to the full Board for a review of the initial decision. If the petition is filed promptly and meets the MSPB's review criteria, the initial decision will not become final until the Board reviews the case. *See id.* § 1201.113. If one party files a petition for review, any other party may submit a cross-petition to the Board within 25 days of the date of service of the petition for review. *Id.* § 1201.114(b),(d).

interim relief required."[7] The agency may decline to follow an AJ's order to return an appellant to his or her position if the agency determines that "the return or presence of [the appellant would be] unduly disruptive to the work environment."[8] If the agency does so, it later must include with its petition for review evidence that it notified the appellant and the AJ of its determination and that it "has provided that the appellant will receive pay, compensation, and all other benefits as terms and conditions of employment [while the] petition for review is pending."[9]

Effect of Failing to Comply with an Interim Relief Order

An agency that fails to comply with an interim relief order normally may not contest the AJ's initial decision before the MSPB. The pertinent regulation states:

> Failure of the agency to submit evidence that it has complied with the granting of the interim relief in accordance with paragraph (b)(1) of this section, or that it has provided notification that interim relief will not be granted fully in accordance with paragraph (b)(2) of this section, will result in dismissal of the agency's petition or cross petition for review.[10]

When the MSPB dismisses a petition or cross-petition for failure to comply with an interim relief order, the original decision becomes final[11] and the Board will order the agency to comply with its terms. In the example described above, the agency would have to cancel the removal and restore the employee to his or her former position, effective from the date of the improper removal. This relief must be accomplished within twenty days of the final decision. The Board also will order the agency to issue a check to the appellant no later than sixty calendar days after the decision becomes final, providing the appellant with back pay, interest, and any other benefits the appellant would have received had he or she not been removed.[12]

From an agency's perspective, dismissal of its petition for review is traumatic. The extensive effort the agency devoted to research, preparation of analyses, strategic planning, and case presentation is swept aside. Dismissal of the petition forces the agency to live with the adverse decision that, in the case of a removal action, requires the agency to restore the appellant to duty with full benefits.

Illustrations of Agency Noncompliance with Interim Relief Orders

A review of MSPB case law shows that the MSPB frequently dismisses agency petitions for one or more of the following deficiencies: (1) filing a petition that is unsupported by evidence that the agency has complied with the interim relief order; (2) failing to provide timely interim relief; (3) providing incomplete interim relief; (4) acting in bad faith when complying with the interim relief order; and (5) inadvertently initiating an action that removes the appeal from the Board's jurisdiction.

Omission of Compliance Evidence

An agency occasionally will neglect to submit evidence that it complied with the interim relief order—or that it complied with the regulatory requirements that apply when an agency declines to return an appellant to his or her position—when it files its petition for review. When this happens, the Board usually will dismiss the agency's petition outright.[13] From time to time, however, the Clerk of the Merit Systems Protection Board will return the petition to the agency, pointing

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[7] *Id.* § 1201.115(b)(1).

[8] 5 U.S.C. § 7701(b)(2)(A)(ii)(II) (Supp. II 1990).

[9] 5 C.F.R. § 1201.115(b)(2) (1992).

[10] *Id.* § 1201.115(b)(4).

[11] *Id.* § 1201.113(b); *cf. id.* § 1201.115(b)(4).

[12] *See, e.g.*, Kerr v. National Endowment for the Arts, 726 F.2d 730 (Fed. Cir. 1984). The Board's authority to order an agency to grant the remedies derives from 5 U.S.C. § 1204(a)(2) (1988). The author's references to regular remedies—such as back pay, interest, and other benefits due to an appellant—and to the time limit within which an agency must comply with an interim order, reflect the standard language the Board uses in its final decisions.

[13] *See, e.g.*, Stanford v. Department of the Army, 53 M.S.P.R. 96 (1992); Dick v. United States Postal Serv., 52 M.S.P.R. 322 (1992); Lucas v. Department of Veterans' Affairs, 52 M.S.P.R. 267 (1992); Nelson v. Department of Health and Human Servs., 51 M.S.P.R. 621 (1991); Wheatley v. United States Postal Serv., 51 M.S.P.R. 238 (1991) Baughman v. Department of the Army, 49 M.S.P.R. 415 (1991). In each of these cases, the agency failed to submit any evidence or affidavits with its original petition to prove that it had complied with the interim relief order. *See generally* 5 C.F.R. § 1201.151(b)(4) (1992) (mandating dismissal of an agency's petition for review for failure to comply with evidentiary requirements).

In *Nelson*, the agency sought a stay of the initial order, but submitted no evidence showing that it had provided interim relief. The motion to stay did not constitute interim relief; accordingly, the MSPB dismissed the agency's petition for review. *Cf.* Westmoreland v. Department of Transp., 49 M.S.P.R. 574 (1991) (refusing to dismiss petition for review when agency requested a stay of the order and provided evidence with its petition for review that it had provided the appellant with interim relief as the AJ had directed).

out the deficiency and giving the agency a second chance to comply with the interim relief order.

This unexpected benefit may not save the agency's case. Assume, for example, that an agency removes an employee, who promptly appeals the removal. On November 7, 1992, the AJ issues an initial decision reversing the appellant's removal. The agency files a petition for review with the Board on December 12—the last day of the thirty-five-day filing period. On December 21, the Board returns the petition because the agency failed to provide evidence that the agency has complied with the interim relief order. On January 4, the agency resubmits its petition, together with evidence that it has complied fully with the interim relief order.

In this case, the Board will not accept the amended petition. Instead, it will dismiss the agency's petition and will reinstate the appellant to his or her former position with full entitlements.[14] The MSPB requires complete compliance with an interim relief order within the regulatory time limit for filing a petition for review.[15] Accordingly, the agency must produce evidence of compliance with interim relief requirements within the filing period. When an agency submits a timely petition for review that is unsupported by evidence of compliance, the Board will reject any subsequent submission that is not filed before the deadline and will dismiss the petition even if the agency actually has provided evidence of full compliance.[16]

Untimely Interim Relief

The following hypothetical describes a typical case in which the Board dismisses an agency's petition because the agency has failed to provide timely relief.[17] An agency removed an employee for alleged misconduct. The employee then appealed the removal to the appropriate MSPB regional office. On August 6, 1992, the AJ issued an initial decision reversing the removal and ordering the agency to restore the appellant to her former position immediately. The agency filed a timely petition for review that included evidence that it restored the appellant to employment on August 10, 1992.

Under these circumstances, the Board will dismiss the agency's petition for review. The AJ's order for interim relief instructed the agency to grant relief to the appellant on August 6. The agency's grant of relief to the appellant on August 10 was four days late; therefore, the agency failed to comply with the interim relief order.

Incomplete Interim Relief

When an agency files a petition for review without satisfying all the conditions of an interim relief order, the Board will dismiss the petition. The MSPB considers an agency's grant of relief under these circumstances to be incomplete.[18]

Suppose that an agency placed an employee on forced leave and the employee appealed. In an initial decision dated December 18, 1990, the AJ reversed the agency, ordering the agency to cancel the action and to restore the appellant to his position. The agency filed a timely petition for review on January 22, 1991, in which it objected to the AJ's interim relief order. It also included a copy of a memorandum as evidence that it had complied with the order. This memorandum, however, revealed that the agency did not return the employee to his original position, but merely placed him in a four-hour-a-day temporary position, starting January 22, 1991—the date the agency filed its petition for review.

In the case from which this hypothetical story derives, the Board dismissed the agency's petition. It found that the agency's action did not comport with the terms of the interim relief order.[19]

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[14] *See* Griesemer v. United States Postal Serv., 52 M.S.P.R. 464 (1992).

[15] *See* 5 C.F.R. § 1201.115 (1992).

[16] *See, e.g.*, Labatte v. Department of the Air Force, MSPB SE07529110445 (Aug. 6, 1992); Purdy v. Department of the Air Force, 53 M.S.P.R. 693 (1992); Brooks v. Department of Veterans' Affairs, 53 M.S.P.R. 93 (1992); Edwards v. Department of the Army, 52 M.S.P.R. 536 (1992). *See generally* 5 C.F.R. § 1201.114(d)-(f) (1992) (establishing the Board's regulatory deadlines for filing petitions and cross-petitions for review).

[17] The author based this scenario on Stevenson v. Department of Defense, 51 M.S.P.R. 622 (1991). For similar decisions involving untimely implementations of interim relief, see Hutchinson v. Department of the Air Force, MSPB SF07529110170 (May 6, 1992) (agency granted interim relief one day after the date ordered); Hurlburt v. Department of Justice, 52 M.S.P.R. 221 (1992) (interim relief was seven weeks late); Ricciardi v. United States Postal Serv., MSPB PH07529110403 (Dec. 30, 1991) (agency restored the appellant to his position more than three weeks after the AJ issued the initial decision); Shatzel v. United States Postal Serv., 51 M.S.P.R. 451 (1991) (relief was untimely by two weeks).

[18] The MSPB regional offices use the term "incomplete relief" to describe any remedy an agency provides an appellant that fails to afford the appellant the full relief that the AJ prescribed in the interim relief order. Many AJs include in this definition relief that an agency provides after the date specified in the order. In this article, however, the author will refer to the latter defect as "untimely" interim relief.

[19] *See* Grady v. Department of the Army, 53 M.S.P.R. 225, 226-27 (1992) (holding that an agency that appointed the appellant to a temporary position, instead of returning him to his original position as a permanent employee, failed to comply fully with an interim relief order to reinstate the appellant); *see also* Brown v. United States Postal Serv., MSPB AT07529010741, 1992 WL 175585 (Jan. 23, 1992). In *Brown*, the agency objected to the AJ's order of interim relief. *Brown*, 1992 WL 175585, at *1. Rather than returning the appellant to full-time employment, it placed him in a temporary assignment in which the appellant worked four hours each day and spent the remaining four hours on administrative leave. *Id.* The Board concluded that this amended action amounted to noncompliance with the order of interim relief. *See id.* at *2.

Agency Acts of Bad Faith

As noted above, an agency may refuse to return an appellant to his or her original duty position, even though an AJ has directed the agency to reinstate the appellant pending the resolution of the agency's petition for review, if the agency determines that the appellant's return or presence would be unduly disruptive to the work environment.[20] Having made this determination, the agency may exclude the appellant entirely from the workplace or may assign him or her temporarily to another position.[21] In either case, it must provide the appellant with the pay, compensation, and other benefits of his or her former position pending the outcome of any petition for review[22] and must comply with regulatory notice requirements.[23]

An appellant denied interim reinstatement to his or her original job cannot ask the MSPB to enforce that portion of the interim relief order.[24] Under limited circumstances, however, he or she may use the agency's refusal as the basis for a motion to dismiss the agency's petition for review.[25]

In considering this motion, the Board will not question an agency's determination that the appellant's return or presence to the workplace would be unduly disruptive.[26] Accordingly, it will not dismiss an agency petition for review if the agency claims to have excluded an appellant from the workplace to prevent undue disruption to the work environment. On the other hand, the Board recognizes that it must "guard against the possibility of an employee's having to suffer assignment of inappropriate duties as a result of an agency's abuse of authority."[27] Accordingly, it will subject to a "bad faith standard of review" an agency's "decision to detail, assign, or restrict the duties of an employee for whom interim relief has been ordered."[28] If the MSPB finds that the reassignment or restriction was discriminatory, demeaning, or inherently unsafe, it will dismiss the agency's petition for review.[29]

"The appellant has the ultimate burden of persuasion on the bad faith issue."[30] A review of MSPB case law, however, suggests that few appellants address this issue seriously. Most merely assert that the agency should have returned them to their former positions because their presences there would not have been unduly disruptive[31]—an argument that the Board will not consider.[32]

To date, the Board has developed its definition of bad faith primarily by negative implication. Most MSPB decisions dealing with this issue focus on what the Board does not consider bad faith. For example, the Board has refused to find bad faith when an agency temporarily reassigns an appellant to a position with different duties in a lower grade if the agency has ensured that the appellant receives the pay, compensation, and other benefits of his or her former position.[33] Likewise, the MSPB has found no bad faith when an agency assigns an appellant to a different position in another facility not far from the appellant's original duty station.[34] An agency may assign a pilot to desk work and may deny him or her recurrent pilot training, even though this allegedly could impair his or her flight skills.[35] Similarly, it may detail an

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[20] 5 U.S.C. § 7701(b)(2)(a)(ii)(II) (Supp. II 1990).

[21] *See* Ginocchi v. Department of the Treasury, 53 M.S.P.R. 62, 69 (1992).

[22] 5 U.S.C. § 7701(b)(2)(B) (Supp. II 1992); *see also* Mascarenas v. Department of Defense, MSPB DE0432910459-I-1 (June 3, 1992).

[23] *See* 5 C.F.R. § 1201.115(b)(2) (1992). *See generally supra* text accompanying note 9.

[24] *Ginocchi*, 53 M.S.P.R. at 68 n.4; *see also* Caryl v. Department of the Treasury, 53 M.S.P.R. 202, 205 (1992).

[25] "The Board's regulations do not provide for a motion for compliance with an order of interim relief, and the Board will not entertain such a motion." *Ginocchi*, 53 M.S.P.R. at 68 n.4. The Board generally will treat an appellant's motion to enforce an interim relief order as a motion to dismiss the agency's petition for review. *See, e.g.*, Nicoletti v. Department of Justice, 53 M.S.P.R. 610, 614 (1992); *Caryl*, 53 M.S.P.R. at 205.

[26] *Ginocchi*, 53 M.S.P.R. at 68.

[27] *Id.* at 70.

[28] *Id.*

[29] See Jeffries v. Department of the Air Force, 53 M.S.P.R. 35 (1992); *Ginocchi*, 53 M.S.P.R. at 70.

[30] *Ginocchi*, 53 M.S.P.R. at 70.

[31] McClellan v. Department of Defense, 53 M.S.P.R. 139 (1992); Ingram v. Department of the Air Force, 53 M.S.P.R. 101 (1992).

[32] *See, e.g., Ginocchi*, 53 M.S.P.R. at 68.

[33] *Id.*

[34] Perry v. United States Postal Serv., MSPB AT07529010478 (July 17, 1992) (finding no bad faith in the Postal Service's assignment of a postmaster to serve as tour superintendent for a post office in a nearby city).

[35] Caryl v. Department of the Treasury, 53 M.S.P.R. 202, 203 (1992).

appellant to another position because circumstances limit the appellant's capacity to perform his or her formal duties.[36]

Agency Actions that Deprive the Board of Subject Matter Jurisdiction

An agency may find its petition for review dismissed if, in response to an order for interim relief, the agency has revoked the action that originally caused the employee or applicant to file an appeal with the MSPB. Assume, for instance, that an agency suspended and demoted an employee on August 5, 1991. The employee appealed the action to the nearest MSPB regional office. In an initial decision dated December 23, 1991, the AJ reversed the agency's actions and ordered the agency to provide interim relief to the appellant if it decided to file a petition for review. The agency filed a timely petition, along with evidence showing that it had complied with the interim relief order by canceling the suspension and demotion, retroactive to August 5, 1991.

In a case similar to this, the Board responded by dismissing the agency's petition for review as moot.[37] It found that, by revoking its original action and reinstating the appellant retroactively, the agency acquiesced to the AJ's initial decision and effected the very remedy that the appellant had pursued by filing an appeal with the MSPB.[38]

Significantly, the MSPB not always will dismiss an agency's petition for review because the agency appears to have revoked the personnel action that gave rise to the appeal. On the contrary: the Board will exercise considerable care to protect the parties' rights. In some cases, the Board's deliberations on this issue may lengthen the appellate process significantly. For example, when faced with the possibility of concurrently dismissing an appeal and an agency's petition for review for mootness, the Board will conduct an extensive review of the case.

In deciding whether to dismiss an agency's petition for review, the Board must consider whether, in complying with the interim relief order, the agency has rescinded completely the action from which the appeal derived. The Board will not conclude that the recision is complete unless sufficient evidence appears in the record to support this conclusion.

If the Board finds sufficient evidence to determine that the recision is complete, it must dismiss the appeal and the agency's petition because it lacks jurisdiction over the matter raised in the appeal.[39] On the other hand, if the Board concludes that the recision is incomplete, it will retain jurisdiction over the appeal and it may hear the case on the merits.[40]

Clearly, the critical issue before the Board is what agency action will constitute a complete recision. In the context of a removal, an agency effects a complete recision when it returns the appellant to the status quo ante.[41] To do so, it must cancel the removal; restore the appellant to his or her former position; provide the appellant with full back pay, with interest, for the entire period the appellant was off the agency's rolls; and reimburse the appellant for any other benefits that he or she would have received had he or she not been removed. If an agency's recision of a removal action is not complete—that is, for example, if the agency returns the appellant to his or her position, but does not provide the appellant with back pay or other benefits—the MSPB will retain jurisdiction over the appeal.[42]

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[36] *See, e.g., Nicoletti*, 53 M.S.P.R. at 614 (holding that the agency's reassignment of a law enforcement agent, "made 'with the consideration of [his] limited duty status which mandate[d] that the appellant not carry a firearm and not work in a high stress environment,'" was not a discriminatory or demeaning act).

[37] Moorer v. Department of Defense, 53 M.S.P.R. 581 (1992).

[38] *See id.*; *see also* Mulherin v. Department of the Air Force, 45 M.S.P.R. 289 (1990); Kent v. Department of the Army, 44 M.S.P.R. 676 (1990).

[39] *See* Trotter v. Department of Defense, MSPB SF07529201961-I-1 (July 29, 1992); Horton v, Department of Veterans' Affairs, MSPB PH07529110239 (May 19, 1992); Flowers v. Department of the Army, 54 M.S.P.R. 103 (1992); McElrath v. Department of Veterans' Affairs, 53 M.S.P.R. 569 (1992); Ostrout v. United States Postal Serv., 53 M.S.P.R. 586 (1992).

In *Flowers*, the Board acknowledged that the agency had intended only to comply with the interim relief order. It noted that the agency's unfamiliarity with the concept of interim relief had led the agency mistakenly to believe that it had to cancel the action at issue. *Flowers*, 54 M.S.P.R. at 105. Nevertheless, the MSPB ruled that it had to look to the effect of the agency's response to the interim order, not to the intent that prompted that response. *See id.* at 106. Because the agency's recision of the action giving rise to the appeal effectively removed the matter from controversy, the Board had to dismiss as moot the agency's petition for review. *See id.*

[40] *See* El-Amin v. United States Postal Serv., 46 M.S.P.R. 367 (1990) (the MSPB retains subject matter jurisdiction when an agency fails to rescind an appealed action completely); Guy v. Department of Energy, 37 M.S.P.R. 230 (1988) (same). Similarly, in Harris v. Department of the Army, 52 M.S.P.R. 87 (1991), the MSPB held that it retained jurisdiction over an appeal following the agency's recision of the appellant's demotion when the agency denied the appellant the opportunity to work the overtime hours to which he previously had been entitled. Because the agency did not return the appellant to status quo ante, the Board concluded that the appellant's demotion was not rescinded completely. *See id.*

[41] Yuni v. Small Business Admin., 38 M.S.P.R. 574 (1988) (an agency's cancellation of an appealed action renders it moot, removing the agency's petition for review from MSPB jurisdiction).

[42] *See* Burzinski v. Veterans' Administration, 39 M.S.P.R. 561 (1989); Watson v. Department of the Treasury, 38 M.S.P.R. 64 (1988); Sarver v. Department of the Treasury, 26 M.S.P.R. 685 (1985).

When the Board cannot tell from the record whether the agency has rescinded a removal completely, it may solicit additional information from the parties by remanding the case to the presiding MSPB regional office. Remand is discretionary. In some circumstances, it will not be practical, given the MSPB's time constraints for processing an appeal.

The MSPB likely will dismiss an agency's petition for review as moot if the Board lacks sufficient evidence to determine whether a removal was rescinded completely. The Board, however, will retain jurisdiction over the appeal to decide any issues raised in the appellant's petition for review. If the appellant's petition fails to meet the MSPB's review criteria,[43] the Board may reopen the case on its own motion and affirm, modify, or reverse the initial decision.[44]

Up to this point, the discussion has focused on situations in which an agency, acting in good faith to comply with an interim relief order, inadvertently renders the appeal moot by canceling the underlying action. On occasion, however, an agency will rescind an action deliberately to avoid having the merits of the case heard by the Board. When an agency moves to dismiss an appeal, claiming that it has rescinded the action at issue, an astute appellant may choose to keep the case before the Board by filing his or her own petition for review.

The following scenario emphasizes this point.[45] Assume that an agency removes an employee. The employee responds by filing a timely appeal, which includes allegations of discrimination. The agency moves to have the appeal dismissed, offering evidence that it has rescinded the action on which the appeal is based. The AJ issues an initial decision, dismissing the appeal as moot. The appellant then files a petition for review, asserting that the agency has not rescinded his removal completely because it has not restored the appellant's social security credits, pension benefits, and retirement plan contributions retroactively to the date of the action.

In the present case, the agency and the appellant clearly have different objectives. The agency's effort to rescind the action is intentional—its objective is to remove the appeal from the Board. The appellant, on the other hand, obviously wants the Board to retain jurisdiction over the appeal so his discrimination allegations may be heard. Presumably, both the agency and the appellant know that the MSPB cannot order an agency to return an appellant to the status quo ante without first hearing the matter on the merits.

Complying with Interim Relief Orders

The problems agencies face when attempting to comply with MSPB interim relief orders may be traced to a number of sources. They may stem from the language that the MSPB uses in the orders themselves; from a lack of internal guidance from the OPM and the agency; or, in some cases, from the agency's unfamiliarity with the subject matter and procedural requirements of the orders.

Fortunately, an agency can overcome these obstacles. An agency representative should develop a systematic approach to complying with interim relief orders. At the outset, he or she must develop an appreciation of what interim relief orders are and how they fit into the appeal process from both the appellant's and the agency's perspectives. Moreover, the agency representative carefully should examine and decipher the language MSPB judges use in their interim relief orders. All too frequently, an order will fail to convey clearly the obligations that the AJ has placed on the agency.[46]

Administrative judges use the following language consistently in interim relief orders:

- "The agency is ordered to cancel the removal action."
- "Interim relief shall be effective upon the issuance of this decision."
- "Any petition for review or cross-petition must be accompanied by evidence that the agency has provided the interim relief required."

Unless an agency representative has spent significant time reviewing prior case law on interim relief, he or she may misinterpret these directives. In many cases, he or she more accurately might translate the admonitions described above as follows:

- "The agency must *not* cancel the action appealed."

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[43] 5 C.F.R. § 1201.115(c) (1992); *see also* Nickerson v. United States Postal Serv., 49 M.S.P.R. 451 (1991).

[44] 5 C.F.R. §§ 1201.116 to .117 (1992). The MSPB also may reopen a case following dismissal of an agency's petition for review if the agency originally failed to submit evidence of compliance with the interim relief order or if the agency's resubmission of evidence was untimely. *See, e.g.*, Ubogy v. Department of the Army, 53 M.S.P.R. 342 (1992).

[45] Roja v. Department of the Navy, 53 M.S.P.R. 326 (1992); *see also* Rauccio v. United States Postal Serv., 44 M.S.P.R. 243 (1990).

[46] A review of MSPB case law confirms that agencies have found the language AJs use in interim relief orders less than clear. This confusion may explain the continuing occurrences of agency noncompliance, particularly in instances involving omissions of evidence of compliance, untimely relief, and cancellations of actions under appeal. For example, in Dean v. Department of the Air Force, 50 M.S.P.R. 103 (1991), the agency incorrectly interpreted the interim relief order to mean that the agency was not required to provide the appellant interim relief until 20 days after the decision became final.

- "Interim relief must be effected *only* on the date of the initial decision."

- "Evidence of compliance with the interim relief order submitted to the Board must consist of an Standard Form 50, detailing the relief provided, along with an affidavit in which the agency attests under oath that interim relief has been granted."[47]

One easily can develop a simple checklist of the tasks an agency must complete, and the milestones that it must observe, to comply with an interim relief order. Ideally, this checklist will prevent untimely filings, submission of ineffective evidence of compliance, provision of untimely or incomplete relief, and accidental recision of an action on appeal.

At a minimum, a checklist should include blanks in which an agency representative may record the date of the initial decision, the due date for filing the petition for review, the date from which interim relief must be made effective, the specific interim relief the agency must provide the appellant, and the date the agency's human resources department completed the requisite personnel actions. It also should include boxes that the representative may check to certify that records of the subject personnel actions, and copies of any affidavits attesting to compliance with the interim order, are attached to the petition for review and that the action itself has not been rescinded. Optional checklist items might include the date the draft petition is due; dates that the representative coordinated selected actions with management; the date the petition was mailed to the Board and to the appellant; and the date the Board received the agency's petition.

New OPM Regulations and Other Useful Guidance

The new regulations on interim relief that the OPM published this year in the *Federal Register* may provide useful guidance to agencies seeking to comply with MSPB orders.[48] The new regulations describe the personnel actions agencies must take to grant interim relief under the WPA, including pay and benefits administration, and the effects of interim relief on retirement, health, and life insurance entitlements.

The regulations instruct agencies to follow separately published instructions to effect proper interim relief.[49] These instructions describe the actions an agency must take when: (1) the agency grants initial interim relief to the appellant, whether the appellant is a current employee, a former employee, or an applicant; (2) the appellant prevails on review before the full Board or when the initial decision becomes final for other reasons; (3) the agency prevails on review; or (4) the parties agree that interim relief should be canceled. The OPM's instructions also provide the "nature of action" codes and citations to legal authority that agencies must use to provide, or to terminate, interim relief.

In addition to the new regulations and instructions, another source of information and assistance for judge advocates and other government attorneys is the agency representative. A representative who has guided his or her agency safely into compliance with an interim order can be an important source of assistance—especially when one considers that much of the knowledge that the representative has gained in this process cannot be gleaned from the MSPB's published decisions. The Board's decisions do not reflect the entire record and the Board rarely reveals exactly what evidence an agency may have submitted to satisfy the requirements of a particular interim relief order.

Details of the evidence an agency submitted to the MSPB to comply with an interim relief order is as close as the telephone. The author has spoken with many agency representatives who have responded effectively to interim relief orders. All were notably open and responsive in discussing the factual and legal issues of their cases, the scope of the relief granted in each case, and the evidence by which the agencies proved that they had complied with the interim relief orders. These practitioners are experts at complying with interim relief orders and their expertise should be used.

Conclusion

The cases described above show that an agency must respond carefully to an AJ's interim relief order if the agency hopes to contest an adverse initial decision. By establishing a checklist similar to the one outlined above, by being familiar with the OPM regulations, and by drawing on the knowledge of experienced agency representatives, a government attorney can help an agency to meet the requirements of interim relief orders and greatly reduce the incidence of dismissals for noncompliance.

[47] In Allen v. Department of the Interior, 54 M.S.P.R. 116 (1992), the agency submitted the following certification to the Board: "I do certify that the interim relief in the initial decision . . . rendered by the administrative judge . . . has been complied with." The MSPB dismissed the agency's petition for review. Noting that the agency had asserted its compliance in an unsworn certification, rather than in an affidavit or a statement made under penalty of perjury, the Board concluded that the agency had presented insufficient evidence of compliance. This conclusion reflected earlier decisions in which the Board held that mere allegations do not constitute evidence of compliance. *See, e.g.*, Fontanilla v. Department of the Navy, 44 M.S.P.R. 312 (1990) (a party's bare statements have no probative value concerning the truth of the assertions those statements convey); Valverde v. Department of the Army, 40 M.S.P.R. 380 (1989) (statements of purported fact in a petition for review based on evidence not in the record are not evidence).

[48] *See generally* 57 Fed. Reg. 3707 (1992).

[49] *See* 5 C.F.R. § 772.102(g) (1992). The OPM published these instructions in part 296-33 of the *Federal Personnel Manual Supplement* and in chapter 296 of the *Federal Personnel Manual*. The OPM also has issued general guidance and instructions for preparing personnel actions to implement the new regulations. *See* Office of Personnel Management, Federal Personnel Manual Letter 296-116, subject: Documentation of Actions to Provide Interim Relief (Feb. 15, 1992).

Should Peremptory Challenges Be Retained in the Military Justice System in Light of *Batson v. Kentucky* and Its Progeny?

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Introduction

The peremptory challenge occupies a unique place in American jurisprudence. Although it lacks a constitutional imperative, almost all trial attorneys value it as an indispensable tool of effective legal representation in an adversary system. Jurists believe that peremptory challenges enhance the fairness of jury trials, although litigants often exercise these challenges arbitrarily. Peremptory challenges simultaneously appear to be essential to the fragile dynamics of the trial process and susceptible to discriminatory manipulation.

Over the past six years, appellate courts have subjected peremptory challenges to unprecedented scrutiny. The catalyst for this rapt attention was *Batson v. Kentucky*,[1] a decision in which the Supreme Court addressed racially based peremptory challenges in the context of what one court later characterized as the "basic incompatibility between the rhetoric of the equal protection clause and the traditional tenets of trial advocacy."[2] *Batson* changed American criminal and civil procedure dramatically. Supreme Court decisions following *Batson* imply that more changes are forthcoming. The continuing litigation of *Batson* issues raises a serious question about the continued efficacy of peremptory challenges in our adversarial system.

This article discusses a proposal that the Armed Forces should respond to *Batson* and its civilian and military progeny by abandoning the peremptory challenge. To illuminate the arguments for and against the elimination of this right from the military justice system, the article begins by reviewing the uses of peremptory challenges in civilian and military practice.

Peremptory Challenges in Civilian Courts

The Supreme Court has held consistently that the Constitution does not require peremptory challenges.[3] Nevertheless, the Court has remarked that the peremptory challenge has "very old [common-law] credentials" and has recognized the "long and widely held belief" that this challenge is "a necessary part of trial by jury."[4]

Every state has adopted some mechanism permitting peremptory challenges or alternative strikes.[5] Each state permits multiple challenges; some allow a litigant to remove a dozen or more potential jurors. Federal civilian practice likewise permits the parties in criminal trials to exercise multiple peremptory challenges.[6] Federal Rule of Criminal Procedure 24 allows each side twenty peremptory challenges in a capital case.[7] A party may exercise a lesser number of peremptory challenges at other trials; the exact amount depends on the severity of the punishment that may be imposed upon the defendant if he or she is convicted.[8]

Trial practitioners traditionally wielded peremptory challenges without restraint. Quoting Blackstone, the Supreme Court once observed that the peremptory challenge is "'an arbitrary and capricious right, and it must be exercised with full freedom, or it fails its purpose.'"[9] Indeed, as recently as 1965, the Court upheld a party's right to exercise a peremp-

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[1] 476 U.S. 79 (1986).

[2] Chew v. State, 527 A.2d 332 (Md. Ct. App. 1987).

[3] Frazier v. United States, 335 U.S. 497 (1984); Swain v. Alabama, 380 U.S. 202, 219 (1965); United States v. Wood, 299 U.S. 123 (1936); Stilson v. United States, 250 U.S. 583 (1919).

[4] *Swain*, 380 U.S. at 212-21.

[5] *Id.*

[6] FED. R. CRIM. P. 24(b).

[7] *Id.*

[8] *Id.*

[9] Lewis v. United States, 146 U.S. 370, 378 (1892).

tory challenge "on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty."[10]

One purpose commonly ascribed to the peremptory challenge was to permit a litigant to remove a juror whom the litigant believed would be unsympathetic to his or her position, for a reason insufficient to sustain a challenge for cause. Occasionally, a litigator would discover this reason in voir dire. A prospective juror's responses might not justify a causal challenge, but otherwise would indicate a specific basis for removal. Peremptory challenges also promoted vigorous voir dire. They permitted an attorney to question a juror closely without fearing the consequences of offending the juror. If the attorney's questions alienated the juror, the attorney could use a peremptory challenge to strike that juror from the panel.

Many attorneys based peremptory challenges on informed guesswork or educated hunches. A juror could be stricken not only for his or her individual characteristics or responses, but also for his or her affiliation with a cognizable group. The latter basis derived from the premise that a stereotype sometimes would betoken an individual juror's response in a specific case. Psychological studies and human experience suggest that the members of groups defined by race, religion, occupation, income, education, or other cultural factors may be predisposed to favor, or to disfavor, an advocate's position. Peremptory challenges allowed attorneys to account for these apparent predispositions in trying to select favorable juries.

Attorneys also exercised peremptory challenges solely on gut feelings. On occasion, every trial practitioner has felt "bad vibes" toward a particular juror—that is, a perception of hostility or discomfort that cannot be quantified logically, supported by statistical data, or even articulated. Undoubtedly, advocates often misread jurors. What an attorney interprets as "bad vibes" often may be no more than simple nervousness or indigestion. Common sense, however, suggests that an attorney's feelings of antipathy toward a juror—based on body language, voice inflection, and other perceptible characteristics—are accurate more often than not. Accordingly, many jurists have opined that peremptory challenges, premised solely on visceral reactions, are rational tools for selecting juries.

In *Batson v. Kentucky*,[11] the Supreme Court altered the essence of the peremptory challenge when it sharply restricted a party's unfettered discretion to strike a juror. The Court held that the Constitution forbids a prosecutor from challenging a potential juror solely because of the juror's race, or on the assumption that jurors of the same race as the accused cannot consider the Government's case impartially.[12] It declared that a criminal defendant has an equal protection right to be tried by a jury from which no "cognizable racial group has been excluded."[13] A defendant may establish a prima facie case of discrimination by showing: (1) he or she is a member of a cognizable racial group; (2) the prosecutor exercised a peremptory challenge to remove a prospective juror of the same race as the defendant; and (3) the prosecutor apparently used the peremptory challenge to exclude the prospective juror because of the juror's race.[14]

The Court significantly modified and expanded *Batson* in three subsequent decisions. First, in *Powers v. Ohio*,[15] the Court held that a defendant may contest a racially based peremptory challenge, regardless of whether the defendant and the challenged juror were of the same race. In *Edmonson v. Leesville Concrete Co.*,[16] the Court applied *Batson* to the private litigants in a civil case. Finally, in *Georgia v. McCollum*,[17] the Court held that *Batson* prohibited racially based peremptory challenges by a criminal defendant. The Court based these decisions primarily on the notion that the exclusion of a juror because of the juror's race violates the equal protection rights not only of the litigants, but also of the challenged juror.[18]

The significance of *Powers*, *Edmonson*, and *McCollum* should not be underestimated. By focusing on the constitutional rights of potential jurors, the Court has suggested that *Batson* may apply to any racially based peremptory challenge by any party. Given this interpretation, *Batson* could bar even an African-American defendant's peremptory challenge of a Caucasian juror. Moreover, the Court arguably has established a precedential foundation for extending *Batson*'s pro-

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[10] *Swain*, 380 U.S. at 220.

[11] 476 U.S. 79 (1986).

[12] *Id.* at 96.

[13] *Id.*

[14] *Id.*

[15] 111 S. Ct. 1364 (1991).

[16] 111 S. Ct. 2077 (1991).

[17] 112 S. Ct. 2348 (1992).

[18] *See* U.S. CONST. amend. XIV.

hibitions to forbid a challenge based on the religion, ethnicity, gender, alienage, or sexual preference of a potential juror.[19] Undeniably, the Supreme Court has expanded *Batson* continuously since it decided that case in 1986 and, in so doing, has relied on a rationale that could support further expansion.

The Court of Military Appeals has ruled that *Batson* applies to courts-martial.[20] Accordingly, military jurists must decide whether the military justice system should retain peremptory challenges. The continued utility of peremptory challenges at courts-martial depends, in part, on the extent to which *Batson* and its progeny apply to military trials.

Peremptory Challenges at Courts-Martial

An accused at a general or special court-martial has a statutory right to select one of several different trial settings.[21] The accused may elect to be tried by military judge alone, permitting the judge to determine the accused's guilt and, if necessary, to adjudge an appropriate sentence.[22] Alternatively, the accused may elect to be tried and sentenced by the members of a court-martial, in the Armed Forces' version of a trial by jury.[23] A general court-martial must be composed of at least five members; a special court-martial requires at least three members.[24] An enlisted accused may demand that enlisted service members comprise at least one-third of the total membership of his or her court-martial.[25]

All members of a court-martial vote on findings and sentence by secret written ballot. A hung jury is impossible. If two-thirds or more of the members vote to find the accused guilty, the accused is convicted; if fewer than two-thirds vote to convict, the accused is acquitted.[26] Similar procedural rules apply to sentencing, except that a three-fourths majority is required to sentence an accused to confinement for more than ten years and unanimity is required for a death sentence.[27]

Court members are detailed to a court-martial by the appropriate convening authority—usually the accused's commanding general or admiral. In selecting each member, the convening authority must consider specific criteria, such as the member's age, education, training, experience, length of service, and judicial temperament.[28] Under no circumstances, however, may a court member be junior in rank to the accused.[29]

The military justice system permits an advocate to exercise challenges for cause against court-martial members. A causal challenge operates at a court-martial as it would in a civilian trial.[30] It is made after voir dire, out of the presence of the members. A party may premise the challenge on any basis that would disqualify a member from serving at a particular trial. Reasons justifying a member's removal include failure to meet the statutory criteria for membership; prior disqualifying involvement in the case, or with a party in the case; personal interest in the result; a decidedly friendly or hostile attitude toward a party; or an inelastic attitude about findings or sentencing. Each party may exercise an unlimited number of causal challenges. The military judge rules on causal challenges; the judge may be challenged only for cause.

A party also may exercise a peremptory challenge.[31] Unlike the civilian courts, however, the military justice system traditionally has viewed peremptory challenges with disfavor.[32]

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[19] *See, e.g.*, United States v. De Gross, 913 F.2d 1417 (9th Cir. 1992) (en banc) (holding that *Batson* prohibits peremptory challenges based on gender). Whether *Batson* actually should be applied to gender-based peremptory challenges, however, remains unsettled. *Compare* Eiland v. State, 607 A.2d 42 (Md. Ct. App. 1992) (*Batson* does not extend to gender-based challenges), *with* State v. Burch, 830 P.2d 357 (Wash. Ct. App. 1992) (*Batson* prohibits gender-based peremptory challenges).

[20] United States v. Santiago-Davila, 26 M.J. 380 (C.M.A. 1988).

[21] UCMJ art. 16 (1988).

[22] *See id.* art. 26; MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 109 (1984) [hereinafter MCM]. A military judge is an experienced judge advocate, certified and assigned under the supervision of his or her service's judge advocate general. *See* UCMJ art. 26(b) (1988).

[23] UCMJ art. 16 (1988).

[24] *Id.*

[25] *Id.* art. 25(c)(1).

[26] *Id.* art. 52(a)(2). A unanimous verdict is required for offenses for which capital punishment is mandatory. *Id.* art. 52(a)(1).

[27] *Id.* art. 52(b).

[28] *Id.* art. 25(d)(2).

[29] *Id.* art. 25(d)(1).

[30] *See generally id.* art. 41(a); MCM, *supra* note 22, R.C.M. 912(f).

[31] *See generally* UCMJ art. 41(b) (1988); MCM, *supra* note 22, R.C.M. 912(g).

[32] *See* United States v. Holley, 17 M.J. 361, 366 n.4 (C.M.A. 1984).

For example, before 1950, neither the trial counsel, nor the accused, could exercise a peremptory challenge in a Navy court-martial.[33] Similarly, the Army did not permit peremptory challenges until it adopted the 1920 Articles of War, which allowed "[e]ach side . . . one peremptory challenge."[34] The Air Force was more liberal, allowing each accused at a common trial to exercise a separate peremptory challenge.[35]

Congress codified the right to exercise peremptory challenges in courts-martial when it enacted the Uniform Code of Military Justice (UCMJ) in 1950.[36] Under UCMJ article 41(b), the prosecutor and each defendant may exercise one peremptory challenge apiece. The Court of Military Appeals has interpreted article 41 to afford an accused a second peremptory challenge when the panel is reduced below a quorum and the convening authority must select additional members to sit on the court.[37] A recent amendment to article 41 recognizes this right, but permits the accused to use the extra challenge to strike only a member subsequently detailed to create a quorum.

A military accused does not enjoy a Sixth Amendment right to a trial by jury. The military courts, however, consistently have recognized an accused's due-process right to be tried by a fair and impartial factfinder. The recent proliferation of statutes[38] and judicial decisions[39] relating to unlawful command influence issues emphasizes the importance of this right.

In this context, the Court of Military Appeals decided that *Batson* applied to military trials. Following the precedent it had established in earlier opinions, the court grounded its decision in *United States v. Santiago-Davila*[40] on the accused's right to a fair and impartial factfinder. It held that a military accused has an equal protection right to be tried by a court-martial from which no cognizable racial group has been excluded. Emphasizing that "[t]his right to equal protection is part of due process under the Fifth Amendment," the court concluded that "it applies to courts-martial, just as it does to civilian juries."[41]

In some ways, military courts have applied *Batson* more liberally than courts in many civilian jurisdictions have applied it. For example, in *United States v. Moore*,[42] the Court of Military Appeals ruled that "every peremptory challenge by the Government of a member of the accused's race, upon objection, must be explained by trial counsel."[43] Accordingly, a military accused, unlike criminal defendants tried by most civilian courts, need not make a prima facie showing of discriminatory intent to support a *Batson* objection.

The military appellate courts apparently will continue to interpret *Batson* at least as broadly as civilian jurisdictions.[44] Accordingly, the military must decide unconditionally whether it should retain its present mechanism for peremptory challenges. Because peremptory challenges lack a constitutional imperative, military jurists may reach this decision by conducting a "cost and benefit" analysis—that is, by determining whether peremptory challenges generally enhance, or detract from, military justice. As is true with any complex and controversial issue, each side can marshal valid arguments to support its position.

Arguments Against Retaining Peremptory Challenges

The case against retaining peremptory challenges in military practice essentially is composed of three arguments. First, the generally accepted reasons for permitting peremptory challenges in civilian trials always have been less compelling for courts-martial. Second, *Batson* has undermined even the limited benefits that peremptory challenges offer in military trials. Third, the added burdens that *Batson* has imposed

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[33] *Id.*

[34] Articles of War of 1920, art. 18, Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 759, 787.

[35] *See Holley*, 17 M.J. at 366.

[36] Congress included peremptory challenges in the UCMJ over the express objections of Armed Forces representatives. *See* United States v. Carter, 25 M.J. 471, 474 (C.M.A. 1988).

[37] *Id.*

[38] UCMJ art. 37 (1988).

[39] *E.g.*, United States v. Thomas, 22 M.J. 388 (C.M.A. 1988).

[40] 26 M.J. 380 (C.M.A. 1988).

[41] *Id.* at 390.

[42] 28 M.J. 366 (C.M.A. 1989).

[43] *Id.* at 368.

[44] *See, e.g.*, United States v. Curtis, 33 M.J. 97 (C.M.A. 1991) (incorporating into military practice later Supreme Court decisions pertaining to *Batson*).

substantially outweigh the marginal advantages of retaining peremptory challenges in the military justice system. Accordingly, peremptory challenges should be eliminated.

As noted above, in selecting the members of a court-martial, a convening authority must cull potential members who fail to meet statutory criteria.[45] This screening helps to ensure that the convening authority details only the individuals best suited to serve as members. Moreover, either party may use one of an unlimited number of causal challenges to excuse a member, selected by the convening authority, who shows traits that disqualify him or her from sitting on the court. Further culling through the use of peremptory challenges is redundant; it can enhance the quality or impartiality of the court-martial only minimally.

Furthermore, *Batson* has undermined many traditional justifications for allowing peremptory challenges at courts-martial. For example, a challenge based on an attorney's inarticulable, visceral reaction to a potential member arguably conflicts with *Batson*'s requirement that the proponent of a peremptory challenge must offer a race-neutral explanation for that challenge on the record. If *Batson* requires military courts to reject antipathy as a basis for peremptory challenges, then an important justification for peremptory challenges no longer is apposite. On the other hand, if the courts permit parties to exercise peremptory challenges without articulable justifications, *Batson* is gutted. Either conclusion argues in favor of eliminating peremptory challenges.

Similarly, before *Batson*, advocates often would predicate peremptory challenges on jurors' group affiliations. A practitioner could base a peremptory challenge on his or her perception that a member of a certain group, influenced by values and experiences generally shared by members of that group, would vote in a particular way. *Batson* flatly prohibits peremptory challenges of this sort, at least when a juror's group affiliation is defined by race. If *Batson* forbids the fulfillment of this fundamental purpose for peremptory challenges, then the wisdom of preserving peremptory challenges is doubtful.

In contrast to the minimal benefits *Batson* permits peremptory challenges to bring to courts-martial, the additional burdens the exercise of these challenges would impose could be extensive. In military practice, the objecting party need not make a prima facie case of discrimination to raise a *Batson* challenge;[46] therefore, that issue must be litigated in every court-martial in which the Government exercises a peremptory challenge against a member of the accused's race. Further, *Batson*'s uncertain parameters and its expansive applications in later Supreme Court decisions suggest that *either* party in a court-martial could cite *Batson* to contest *any* peremptory challenge, regardless of the race of the juror, or of the party exercising the challenge. The costs associated with these procedures—even if one considers only the excessive trial and appellate litigation they would require—militate against retaining peremptory challenges.

Practical considerations aside, *Batson* addressed a procedure that arose apart from, and is anomalous to, the military justice system. The history of courts-martial reflects that peremptory challenges enjoyed no special standing in military courts, but were an extraneous feature transplanted from civilian practice.

Considering all these circumstances, retaining peremptory challenges in the military justice system appears irrational. The solution, perhaps, is to cut the Gordian knot by eliminating peremptory challenges entirely from courts-martial.

Arguments in Favor of Retaining Peremptory Challenges

Several compelling reasons support the retention of peremptory challenges at courts-martial, even in light of *Batson* and its potential extensions. Some of the reasons are unique to the military; others are common to all jurisdictions.

In courts-martial, as in civilian trials, peremptory challenges serve as a safety net for aggressive voir dire. An attorney may ask a potential juror embarrassing or challenging questions without fear, knowing that the juror can be excluded if these questions arouse the juror's hostility. The attorney would not enjoy this certainty if he or she could challenge the juror only for cause.

If conducted within proper bounds, aggressive voir dire enhances justice. It not only ventilates the biases and other disqualifications of potential jurors, but also allows a skilled advocate to frame his or her trial themes and to begin educating the factfinder. Accordingly, eliminating peremptory challenges could chill effective voir dire.

Aggressive voir dire often reveals a "quasi-causal" basis for challenging a potential member—that is, a rational, individualized reason that does not rise to the strict requirements for purely causal disqualification. The dynamics of the military environment enhance the significance of quasi-causal peremptory challenges in military trials. Compared to their civilian counterparts, military jurisdictions often are small and intensely interactive communities. Prosecutors and defense counsel frequently have personal or professional relationships with persons detailed as members of courts-martial. The knowledge or insight an attorney gains from this familiarity sometimes will provide the attorney with a sound reason to exclude a potential member. If this reason will not sustain a causal challenge, a quasi-causal peremptory challenge may be the attorney's only effective means of removing the undesirable member.

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[45] *See* UCMJ art. 25(d) (1988).

[46] *Moore*, 28 M.J. at 368.

The hesitancy of some military trial judges to grant challenges for cause exacerbates the need for quasi-causal challenges at courts-martial. Despite the repeated declarations of the Court of Military Appeals that military judges must grant challenges for cause liberally, military judges sometimes deny these challenges unreasonably or use pro forma questions to rehabilitate members who actually should have been excluded.[47]

The troubling history of causal challenges at courts-martial implies that eliminating peremptory challenges could have several undesirable consequences. First, eliminating peremptory challenges would permit many individuals, who otherwise would have been excused through quasi-causal peremptory challenges, to serve as members. Second, the use of causal challenges at trial would become increasingly litigious. Finally, the appellate courts would scrutinize denied causal challenges more closely than they do presently. A reviewing court would be less willing to conclude that a trial judge's error in denying a causal challenge was harmless if the member could not have been removed peremptorily.[48]

Several considerations unique to the military justice system reveal the wisdom of preserving peremptory challenges in courts-martial. The military periodically must confront issues involving the actual or apparent exercise of unlawful command influence.[49] Congress responded to this recurring problem by granting a single peremptory challenge to each military accused.[50]

The perception of unlawful command influence is exacerbated by the manner in which courts-martial members are selected. Pursuant to UCMJ article 25, the convening authority—an officer who, in practice, is almost always a senior officer and often is the general officer commanding an installation—selects persons to be detailed as members in a particular case. Even when the convening authority acts with the best of motives, an appearance of inappropriate command influence may arise. By referring the case to court, the commander indirectly communicates a belief that the charges against the defendant are well founded. Moreover, the convening authority personally selects the members who will pass judgment on the accused's guilt or innocence. Not surprisingly, this process occasionally will create a perception that the convening authority chose the members simply to rubber-stamp a determination that the accused is guilty. Although this perception neither accurately reflects the court-martial process, nor represents the common understanding of the members who are detailed to a court-martial, a genuine problem of perception persists. In this context, for Congress to eliminate the peremptory challenge at military trials would be particularly unwise and probably unpalatable.

As far as possible, the Armed Forces must "apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[51] Congress premised this mandate on the belief that accused service members generally are entitled to all the protections afforded to civilian defendants, absent compelling military reasons to the contrary. Many considerations unique to the Armed Forces, however, actually favor maintaining, or even increasing, the number of peremptory challenges at a court-martial.[52] Certainly, the unique circumstances of a military trial do not support reducing any protections presently accorded to a military accused.

Predictions that increased litigation will attend peremptory challenges probably are overstated. The single peremptory challenge allowed to each party sharply curtails the number of potential *Batson* issues that could arise at a court-martial. Furthermore, military panels generally include several African-American and Caucasian members. Consequently, serious *Batson* issues probably will not emerge when either party in a court-martial exercises a single peremptory challenge. In any event, the increased litigation that presumably may be avoided if peremptory challenges are eliminated undoubtedly would be offset by litigation generated by the enhanced appellate scrutiny of causal challenges this change would provoke.

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[47] United States v. Murphy, 26 M.J. 454, 455-56 (C.M.A. 1988) (military judge denied challenges against two members responsible for rating other members of the court-martial); United States v. Towers, 24 M.J. 143, 146 (C.M.A. 1987) (defense counsel unsuccessfully challenged a member detailed to a child-abuse trial who had extensive prior civilian experience as a social services counselor); United States v. Cams, 27 M.J. 820, 827 (A.C.M.R. 1988) (unsuccessful challenge of member detailed to a bad-check trial who had a personal and professional interest in stopping bad checks); United States v. Smith, 25 M.J. 785, 787 (A.C.M.R. 1988) (military judge denied defense challenges against two members who had been victims of multiple crimes); United States v. Yardley, 24 M.J. 719, 723 (A.C.M.R. 1987) (military judge denied challenge against a member detailed to a child-abuse trial who expressed abhorrence to sexual offenses involving children and who acknowledged that he would sentence these offenders more harshly than he would sentence other convicted accused); United States v. Swagger, 16 M.J. 759 (A.C.M.R. 1983) (military judge denied defense challenge against seating the installation provost marshal as senior member). *See generally* United States v. Smart, 21 M.J. 15 (C.M.A. 1985). The cases described above were noted and discussed in David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 20-21 (1991).

[48] *See generally* UCMJ art. 59(a) (1988) (the finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused).

[49] *E.g.*, United States v. Mabe, 28 M.J. 326 (C.M.A. 1989); United States v. Cruz, 25 M.J. 326 (C.M.A. 1987); United States v. Thomas, 22 M.J. 388 (C.M.A. 1986); United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976).

[50] United States v. Holley, 17 M.J. 361, 373 (C.M.A. 1984) (Everett, C.J., dissenting). Chief Judge Everett asserted that Congress provided the accused with the right to exercise a peremptory challenge as an "added protection against [unlawful command] influence." *See id.*

[51] UCMJ art. 36(a) (1988).

[52] *See generally supra*, notes 47-50 and accompanying text.

Beyond these practical considerations, eliminating peremptory challenges at courts-martial in response to *Batson* might send an unfortunate signal to the public about the quality of military justice. To date, no civilian jurisdiction seriously has considered restricting or eliminating peremptory challenges because of *Batson*. Given all the reasons that support retaining peremptory challenges at courts-martial—even after the Supreme Court decided *Batson*—the military justice system should not be amended to abrogate the limited rights to exercise peremptory challenges that presently are available to accused and trial counsel.

Conclusion

Whether the military justice system should abandon peremptory challenges in light of the requirements of *Batson* and its progeny is an open question. Nevertheless, it is a question that military criminal law practitioners and Congress should consider carefully. If they respond wisely to the issues raised in *Batson*, the military justice system could arrive at a solution that would stand as a model for other jurisdictions.

The Regulation of Printed Materials on Military Installations

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> Congress shall make no law . . . abridging the freedom of speech.[1]

Installation commanders and judge advocates periodically must struggle to define the proper relationship between an individual's free expression right to disseminate literature[2] and the essential command prerogative of maintaining good order and discipline. This struggle arises in a variety of contexts, from regulating commercial solicitation to determining whether individuals may enter a military installation to pass out pamphlets.

This article explores recent decisions in which the Supreme Court and the circuit courts of appeal have addressed the government's attempts to regulate expressive conduct on federal property. This information should help commanders and military attorneys to respond appropriately when circumstances require them to limit freedom of expression.

Regulation of Expression: A Primer

To appreciate a commander's role in regulating expressive conduct, one must understand the analysis the Supreme Court and the lower courts use to determine whether plans restraining freedom of expression on government enclaves violate the First Amendment. The Supreme Court's latest decision in this area is *United States v. Kokinda*.[3]

In *Kokinda*, two volunteers working for the National Democratic Party Committee erected a table on a sidewalk leading to the entrance of a post office. The entire sidewalk was located on Postal Service property. At the table, the volunteers solicited contributions and sold books and subscriptions to the party newspaper. The postmaster asked the volunteers to leave. When they refused to do so, they were apprehended by postal inspectors, who also confiscated the table, the literature, and other items.[4]

The volunteers were convicted before a United States magistrate of violating a postal regulation that prohibited "[s]oliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises."[5] They unsuccessfully appealed their convictions to the United States District Court for the District of Maryland, then took their cases to the Fourth Circuit Court of Appeals. The Fourth Cir-

[1] U.S. CONST. amend. I.

[2] *See* Griswold v. Connecticut, 381 U.S. 479 (1965) ("the freedom of speech and press includes not only the right to utter and print, but [also] the right to distribute [information]").

[3] 110 S. Ct. 3115 (1990).

[4] *Id.* at 3118.

[5] 39 C.F.R § 232.1(h)(1) (1989), *cited in Kokinda*, 110 S. Ct. at 3118.

cuit overturned the convictions.[6] Asserting that all sidewalks "presumptively [are] public forums,"[7] the court concluded that the postal regulation "offend[ed] the First Amendment [because] it [was] neither a reasonable manner restriction nor . . . narrowly drawn to accomplish a significant government interest."[8] The Government petitioned the Supreme Court for a writ of certiorari. The Court granted certiorari to resolve a conflict among the circuit courts.[9]

In a five-to-three vote, the Supreme Court reversed the Fourth Circuit and upheld the convictions. In a plurality opinion, expressing the views of four members of the Court, Justice O'Connor applied a three-part analysis to uphold the regulation.

Justice O'Connor first considered whether the commercial solicitation at issue was "speech" protected by the First Amendment. Citing a list of prior Supreme Court decisions,[10] she quickly determined that this commercial solicitation was constitutionally protected.[11]

Next, Justice O'Connor directed her attention to whether the sidewalk involved was a "public forum" for First Amendment purposes. To answer this question, she applied an analysis that the Court first announced in *Perry Education Association v. Perry Local Educators' Association*.[12] In that decision, the Court had contrasted public and nonpublic forums, remarking,

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks . . . . [T]o enforce a content-based exclusion [in these quintessential public forums, the government] must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression [that] are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.
>
> A second category consists of public property [that] the State has opened for use by the public as a place for expressive activity. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as a traditional public forum . . . .
>
> Public property [that] is not by tradition or designation a forum for public communication is governed by different standards. . . . [T]he "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.[13]

Using this analysis, Justice O'Connor held that the sidewalk leading to the post office was not a public forum. She stressed that the postal sidewalk lacked the characteristics of public sidewalks traditionally open to expressive activity, noting that, unlike "the municipal sidewalk [running] . . . parallel to the road in this case," the Postal Service's sidewalk "was constructed solely to provide for the passage of individuals engaged in postal business."[14]

Justice O'Connor also emphasized that the Postal Service had "not expressly dedicated its sidewalks to any expressive activity."[15] She observed that Postal Service property is

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[6] United States v. Kokinda, 866 F.2d 699 (4th Cir. 1989), *rev'd*, 110 S. Ct. 3115 (1990).

[7] *Id.* at 701.

[8] *Id.* at 703.

[9] *Kokinda*, 110 S. Ct. at 3118.

[10] Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988); Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

[11] *Kokinda*, 110 S. Ct. at 3118.

[12] 460 U.S. 37 (1983).

[13] *Id.* at 45-46 (citations omitted).

[14] *Kokinda*, 110 S. Ct. at 3120.

[15] *Id.* at 3121.

"dedicated to only one means of communication: the posting of public notices on designated bulletin boards. No postal service regulation opens postal sidewalks to any First Amendment activity."[16] Justice O'Connor conceded that the Postal Service previously had permitted "individuals or groups to leaflet, speak, and picket on postal premises."[17] She stated, however,

> [A] regulation prohibiting disruption . . . and a practice of allowing some speech activities on postal property do not add up to the dedication of postal property to speech activities. . . . "[T]he government does not create a public forum by . . . *permitting* limited discourse, but only by intentionally opening a nontraditional forum for public discourse . . . ."[18]

Finally, Justice O'Connor concluded that the postal regulation reasonably restricted the use of the forum. Examining the Postal Service's assertion that the regulation was needed to prevent interference with distribution of the mails,[19] she noted that the Postal Service briefly had permitted limited solicitation in post offices, but had abandoned this practice upon finding that it "distracted [managers] from their primary jobs"[20] and "was so complex as to be unadministrable."[21] She remarked,

> [O]n the basis of this real-world experience[,] . . . the Postal Service enacted the regulation at issue in this case. The Service also enacted regulations barring deposit or display of written materials except on authorized bulletin boards "to regain space for the effective display of postal materials and the efficient transaction of postal business, eliminate safety hazards, reduce maintenance costs, and improve the appearance of exterior and public-use areas on postal premises." . . . In short, the Postal Service . . . prohibited the use of its property and resources [when] the [resulting] intrusion [would] . . . interfere [significantly] with Congress's mandate to ensure . . . effective and efficient distribution of the mails.[22]

As discussed below, the courts generally consider military installations to be nonpublic forums. Consequently, *Kokinda* should support an installation's promulgation of local regulations governing expressive conduct, if these regulations relate reasonably to the installation's mission.

Military Installations: Public or Nonpublic

Following the Supreme Court's decision in *Greer v. Spock*,[23] the federal courts generally have found military installations to be nonpublic forums.[24] In *Greer*, the Supreme Court upheld the authority of an installation commander to forbid political activists from distributing leaflets on the installation. Justice Stewart, writing for the Court, declared,

> One of the very purposes for which the Constitution was ordained and established was to "provide for the common defence" and this Court . . . has on countless occasions recognized the special constitutional function of the military in our national life . . . . [I]t is "the primary business of armies and navies to fight or be ready to fight wars . . . ." [C]onsequently the business of a military installation like Fort Dix [is] to train soldiers, not to provide a public forum.[25]

Justice Stewart also observed that a "necessary concomitant of the basic function of a military installation has been 'the historically unquestioned power of [its] commanding officer summarily to exclude civilians from the area of his [or her] command.'"[26] Accordingly, he concluded that the "notion that federal military reservations . . . traditionally [have]

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[16] *Id.*

[17] *Id.*

[18] *Id.* (citing Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 803 (1985); *Perry Educ. Ass'n*, 460 U.S. at 47).

[19] *Id.* at 3122-24.

[20] *Id.* at 3124.

[21] *Id.* at 3122.

[22] *Id.* at 3124 (citations omitted).

[23] 424 U.S. 828 (1976).

[24] *See* Donna C. Maizel & Samuel R. Maizel, *Does an Open House Turn a Military Installation into a Public Forum?* United States v. Albertini *and the First Amendment*, ARMY LAW., Aug. 1986, at 11.

[25] *Greer*, 424 U.S. at 838 (quoting United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955)).

[26] *Id.* (quoting Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 893 (1961)).

served as . . . place[s] for free public assembly . . . [is] historically and constitutionally false.[27]

Because commentators already have written at length about the early development of the law in this area,[28] the remainder of this article concentrates on recent cases that directly or indirectly have expanded the power of commanders to regulate the distribution of printed materials on military installations.

Regulation of the Printed Word

Perhaps the most hotly contested First Amendment battles in recent years have focused on the authority of government officials to regulate the distribution of printed materials on federal property. This issue typically has required courts to assess the legalities of regulations curtailing the times, places, or manners in which individuals or businesses may enter federal property to distribute printed solicitations.[29]

The Supreme Court's most recent entry into this arena is *Cornelius v. NAACP Legal Defense & Education Fund*.[30] In *Cornelius*, the National Association for the Advancement of Colored People challenged as unconstitutional an executive order and the implementing regulations that the Office of Personnel Management (OPM) adopted to execute that order. As amplified by the regulations, the executive order prohibited certain organizations from soliciting funds through the Combined Federal Campaign (CFC). It specifically excluded from the CFC all "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves."[31]

The District Court for the District of Columbia held that the executive order violated the First Amendment. It found that the CFC was a limited public forum, that the exclusion had been based upon content, and that the Government had failed to show that the restriction furthered a compelling state interest.[32] The Court of Appeals for the District of Columbia affirmed the district court. It found the restrictions unreasonable under even the least restrictive constitutional standard.[33] After the appeals court denied the Government's petition for rehearing, the Government obtained certiorari.[34]

Four of seven Supreme Court justices voted to reverse the lower courts. Writing the majority opinion, Justice O'Connor used the *Perry Education Association* analysis to uphold the order. Justice O'Connor first determined that the solicitation of funds for charitable purposes was speech protected by the First Amendment. Citing *Village of Schaumburg v. Citizens for a Better Environment*,[35] she stated that "charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment."[36]

Justice O'Connor then decided that the CFC was not a public forum. Initially, she observed that "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities."[37] She then expanded the *Perry Education Association* analysis, declaring,

> The Government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum . . . . We will not find that a public forum has been created in

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[27] *Id.*

[28] *See generally* Maizel & Maizel, *supra* note 24.

[29] *See generally* DEP'T OF ARMY, REG. 210-10, INSTALLATIONS: ADMINISTRATION, para. 6-4c (15 Apr. 1978); DEP'T OF ARMY, REG. 360-81, ARMY PUBLIC AFFAIRS: COMMAND INFORMATION PROGRAM, para. 2-39 (20 Nov. 1989) [hereinafter AR 360-81]; DEP'T OF ARMY, REG. 600-20, PERSONNEL—GENERAL: ARMY COMMAND POLICY, para. 5-9 (I02, 1 Apr. 1992) [hereinafter AR 600-20]. Pursuant to these regulations, most Army installations have adopted local procedural guidance directing appropriate staff agencies, such as the installation public affairs offices, to review literature distribution requests for installation commanders. *See, e.g.*, U.S. ARMY ENG'R CENTER & FORT LEONARD WOOD, SUPP. 1 TO ARMY REG. 210-10 (23 Feb. 1988).

[30] 473 U.S. 788 (1985).

[31] *Id.* at 795.

[32] *Id.* at 796.

[33] *Id.*

[34] *Id.*

[35] 444 U.S. 620 (1980).

[36] *Cornelius*, 473 U.S. at 798.

[37] *Id.* at 799.

> the face of clear evidence of a contrary intent[,] . . . *nor will we infer that the Government intended to create a public forum when the nature of the property is inconsistent with expressive activity.*[38]

Examining the history of the CFC, Justice O'Connor noted that the "Campaign [actually] was designed to minimize the disruption to the workplace that had resulted from unlimited ad hoc solicitation[s] . . . by *lessening* the amount of expressive activity occurring on federal property. Indeed, the OPM stringently limited expression to the 30-word statement included in the Campaign literature."[39] She opined that, although the decision of the government to limit access to the CFC was not dispositive per se, it was "relevant for what it suggest[ed] about the Government's intent in creating the forum."[40]

Justice O'Connor also remarked that the federal workplace, "like any place of employment, exists to accomplish the business of the employer."[41] As an employer, the government "'must have wide discretion and control over the management of its personnel and internal affairs,'"[42] Accordingly, the government may "exercise control over access to the federal workplace . . . to avoid interruptions to the performance of the duties of its employees."[43] In light of the government's policy in creating the CFC, and its practice in limiting access, Justice O'Connor concluded that the CFC was a nonpublic forum.[44]

Having determined that the CFC was a nonpublic forum, Justice O'Connor addressed the requirements for finding the regulation constitutional. The decision to restrict access to a nonpublic forum, she commented, need only be reasonable; it need not be the most reasonable or the only reasonable decision.[45] "In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated."[46] Instead, the "reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances."[47] Applying this standard, Justice O'Connor concluded that the government's justifications of minimizing disruption in the federal workplace, ensuring the success of the CFC, and avoiding the appearance of political favoritism were sufficiently reasonable to render the regulation constitutional.[48]

After the Court decided *Cornelius*, two federal circuit courts used the *Perry Education Association* and *Cornelius* analyses to uphold restrictions on the distributions of commercial publications on military installations. In *M.N.C. of Hinesville v. Department of Defense*,[49] the Eleventh Circuit considered a challenge to Fort Stewart's practice of affording preferential treatment to its civilian enterprise newspaper (CEN).[50] M.N.C. of Hinesville (M.N.C.), the publisher of the Fort Stewart post newspaper, *The Patriot*, lost the right to publish the newspaper to a competing firm.[51] M.N.C. then formed a new newspaper, *Coastal Courier's Army Advocate*. It asked the Fort Stewart public affairs office to provide it with the same information that the fort provided to *The Patriot* and requested permission to distribute *Coastal Courier's Army Advocate* in the same time, place, and manner as *The*

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[38] *Id.* at 802-04 (emphasis added).

[39] *Id.* at 805.

[40] *Id.*

[41] *Id.*

[42] *Id.* (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

[43] *Id.* at 806.

[44] *Id.*

[45] *Id.* at 808 (citing *Perry Educ. Ass'n*, 460 U.S. at 37).

[46] *Id.*

[47] *Id.* at 809. Justice O'Connor added, "Even if some incompatibility with general expressive activity were required, the CFC would meet the requirement because it would be administratively unmanageable if access could not be curtailed in a reasonable manner." *See id.*

[48] *Id.* at 809, 813.

[49] 791 F.2d 1466 (11th Cir. 1986).

[50] A civilian enterprise newspaper (CEN) is a newspaper, published by a commercial firm and distributed through official distribution channels, that a local command uses to disseminate command information. As legal consideration for the publication contract, the command "offers [the publisher] rights and authorizations [to obtain revenue through advertising sales] instead of money." *See* AR 360-81, *supra* note 29, para. 2-27*a*(1); *see also id.*, para. 2-23 ("[n]either appropriated nor nonappropriated monies may be used to pay for any part of the civilian printer's [production] costs").

[51] An installation must award a contract to publish a CEN competitively. *See id.*, para. 2-27*d*. Because a CEN contract "does not involve the changing of monies, adherence with the Federal Acquisition Regulation (FAR) is not required." *Id.* Nevertheless, *AR 360-81* expressly directs installations to "follow FAR procedures wherever possible." *See id. See generally* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION Reg. pt. 6 (1984).

Patriot. When the command at Fort Stewart denied both requests, M.N.C. filed suit, seeking injunctive relief.[52]

The Government conceded the equal access to information issue in its argument before the district court, leaving as the sole remaining issue the Army's refusal to grant M.N.C. access to CEN distribution points. The district court granted the Government's motion for summary judgment and M.N.C. appealed to the Eleventh Circuit.[53]

The Eleventh Circuit held that the government's actions had affected activities that fell under the protection of the First Amendment.[54] It then considered the district court's finding that Fort Stewart was a nonpublic forum. On appeal, M.N.C. had acknowledged that Fort Stewart normally is a nonpublic forum. It had asserted, however, that "by allowing *The Patriot* to be distributed through access points that are off limits to other newspapers, the Army . . . [had] turned these access points into a public forum to which all newspapers similar to *The Patriot* must be given equal access."[55] The Eleventh Circuit disagreed, concluding that M.N.C.'s "contention [was] foreclosed by *Perry*."[56] The court opined that the

> Army's actions in this case did not change the access points . . . into a public forum. The access allowed *The Patriot* is more limited than the access [allowed] . . . in *Perry*. While the school district in *Perry* allowed organizations other than the incumbent union to use [teachers'] mailboxes, nothing in the present record indicates that any nonmilitary organization other than the CEN [was] authorized to distribute material through the access points.[57]

Accordingly, "the access points at Fort Stewart . . . to which *The Patriot* [was] granted access and from which other papers [were] excluded [were] not . . . a public forum."[58]

Finally, the court examined the reasonableness of the government's decision to deny M.N.C. access to the distribution points. The court ruled that the Army's interests in enhancing life on military installations by distributing command information to military personnel, promoting CENs as vehicles for the dissemination of command information, and granting distribution monopolies to encourage publishers to bid on CEN proposals were reasonable bases for this restriction.[59]

In *Shopco Distribution Co. v. Commanding General of Camp Lejeune*,[60] the Fourth Circuit addressed a related issue when it weighed the rights of private parties to distribute advertising circulars on military installations. Shopco Distribution (Shopco), the publisher of a circular called *The Shopper*, sued to overturn an order in which the base commander sharply restricted the distribution of advertising circulars in the family housing areas of Camp Lejeune, North Carolina. Previously, the commander had allowed businesses to distribute circulars door-to-door. Under the new order, however, the only nonsubscription publication that could be distributed in this manner at Camp Lejeune was the base CEN, *The Globe*.[61] Other publications could be circulated only through certain designated outlets.

In an extensive opinion, the district court granted summary judgment to the Government.[62] Shopco appealed, contending that the base commander's decision infringed on Shopco's freedom of expression by forcing Shopco to spend $400 per week to mail copies of *The Shopper* to persons who formerly had received it by door-to-door deliveries.[63]

Both parties agreed that the advertising circulars were a form of protected speech. Accordingly, the Fourth Circuit concentrated on the type of forum involved and the reasonableness of the government's restrictions.

Shopco contended that the Marine Corps had opened Camp Lejeune's housing areas to public commercial discourse. It

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[52] *M.N.C. of Hinesville*, 791 F.2d at 1470-71.

[53] *Id.* at 1471.

[54] *Id.* at 1472.

[55] *Id.* at 1473.

[56] *Id.*

[57] *Id.* at 1474.

[58] *Id.*

[59] *Id.* at 1476-77.

[60] 885 F.2d 167 (4th Cir. 1989).

[61] *Id.* at 169-70.

[62] Shopco Distrib. Co. v. Commanding Gen. of Marine Corps Base, Camp Lejeune, N.C., 696 F. Supp. 1063 (E.D.N.C. 1988), *aff'd*, 885 F.2d 167 (4th Cir. 1989).

[63] *Shopco Distrib. Co.*, 885 F.2d at 170.

pointed out that the commanding general permitted pizzerias and laundries to deliver to Camp Lejeune customers; that certain areas of the base included civilian-run commercial enterprises; and that the commanding general previously had allowed Shopco to distribute the *Shopper* door-to-door.

The Fourth Circuit disagreed. It emphasized that the Marine Corps strictly limited access to Camp Lejeune's housing areas, noting that these neighborhoods "are sharply and easily distinguished from civilian residential areas."[64] It added,

> Access to four of the nine camp housing areas is controlled by armed sentries. Access to the remaining five areas is restricted to residents, invited guests, and those on official business. These restrictions are posted and enforced by military police. By imposing and enforcing these access restrictions, the Commanding General has taken the necessary steps to preserve the status of the Camp's residential areas as integral portions of Camp Lejeune.[65]

The court expressly rejected Shopco's contention that the commanding general had permitted Camp Lejeune to become a public forum. It opined,

> [Pizza and laundry deliveries] do not convert the base housing areas to a public forum. . . . Nor does the civilian operation of businesses at shopping centers located on Camp Lejeune convert the housing areas into public forums. . . . Finally, *Perry* forecloses appellant's contention that the previous door-to-door distribution of *The Shopper* to the Camp's residential areas converts these areas to public forums. . . . Here, as in *Perry*, the Commanding General chose to allow *The Globe* door-to-door delivery privileges, based on its status as a CEN, and blocked such distribution on the part of *The Shopper* because appellant no longer published the Camp's CEN. The Commanding General's . . . actions did not change the housing areas from nonpublic to public forums.[66]

The court also emphasized that, "[e]ven assuming *arguendo* that the Commanding General did, by previously granting permission to *The Shopper* to distribute door-to-door, change Camp Lejeune housing areas from nonpublic to public forums, he '[was] not required to indefinitely retain the open character of the[se] facilit[ies].'"[67] The general's revocation of Shopco's right to distribute the *Shopper* door-to-door clearly demonstrated the "intent to make base housing areas generally off limits to door-to-door delivery."[68]

Having resolved that Camp Lejeune was a nonpublic forum, the Fourth Circuit wasted no time in determining that the base commander's restrictions were reasonable. Quoting at length from the Eleventh Circuit's decision in *M.N.C. of Hinesville*,[69] the Fourth Circuit agreed "with [its] sister circuit's conclusion"[70] that establishing a distribution monopoly for a CEN on a military installation was a reasonable restriction of expression that could withstand a First Amendment challenge.[71]

Conclusion

The judicial decisions on the restraint of written expression on federal installations should send a clear signal to judge advocates. Whenever a reasonable, content-neutral basis exists to restrict distribution of publications on a military installation, a court will afford great deference to a commander's decision to limit the time, place, or manner of distribution—or, in extreme cases, to prohibit distribution entirely. Although, as a matter of policy, the Department of the Army discourages a commander from flatly prohibiting any distribution of literature,[72] these opinions strongly suggest that the courts would uphold even an absolute prohibition on distribution if that prohibition were content-neutral.

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[64] *Id.* at 172.

[65] *Id.*

[66] *Id.* at 173.

[67] *Id.* (quoting *Perry Educ. Ass'n*, 460 U.S. at 45).

[68] *Id.* The court commented that the commanding general also demonstrated the intent to forbid door-to-door deliveries to base housing areas by barring another advertising circular, *The Extra*, from door-to-door delivery. *See id.*

[69] *See id.* at 174-75 (citing *M.N.C. of Hinesville*, 791 F.2d at 1476-77).

[70] *Id.* at 175.

[71] *Id.* at 174-75.

[72] *See* AR 600-20, *supra* note 29, para. 5-9 (I02, 1 Apr. 1992).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Criminal Law Note

An Ongoing Trend: Expanding the Status and Power of the Military Judge

Introduction

"No one who has read the legislative history of the Code can doubt the strength of the Congressional resolve to break away completely from the old procedure and insure, as far as possible, that the law officer perform in the image of a civilian judge."[1] With this statement, the Court of Military Appeals began a series of decisions in which it gradually has moved the status of military judges closer to that of their counterparts in the federal civilian justice system. To appreciate the current role of military judges, one must examine not only their present powers, but also the historical development of the military trial judiciary.[2] This history not only explains the bases for the current powers of military judges, but also suggests that the trend of expanded powers will continue. Decisions from the Court of Military Appeals also imply that, in time, military judges will assume still more of the powers now associated with the federal civilian bench.[3]

Historical Development: Law Member to Law Officer

The 1916 Articles of War,[4] Congress's earliest and most comprehensive effort to establish a code of laws to meet the unique needs of the United States military,[5] directed convening authorities to detail a judge advocate to each court-martial. A judge advocate served as a prosecutor[6] and as a legal advisor.[7] He also advised unrepresented accused of certain fundamental rights.[8] The 1916 Articles did not require a convening authority to detail a separate legal advisor to the court, nor did they state that a judge advocate had to be an attorney.[9] After World War I ended, complaints that the 1916 Articles had failed to protect the individual rights of service members prompted Congress to enact the 1920 Articles of War.[10]

The 1920 Articles required a convening authority to appoint a law member for each court-martial, directing that, whenever possible, this individual should be detailed from the Army's Judge Advocate General's Department (JAGD).[11] A law member deliberated with the court-martial and voted with the court on the findings and sentence.[12] The law member also ruled on interlocutory questions arising during the proceedings.[13] These procedures remained virtually unchanged until the end of World War II. After the war, however, powerful veterans' groups and civilian bar associations sharply criticized the 1920 Articles, demanding changes that

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[1] United States v. Keith, 4 C.M.R. 85, 88 (C.M.A. 1952).

[2] This article discusses only the historical development of the powers of the military trial judiciary. Within the limits of the article, the authors cannot address the historical development of the entire military justice system or the Uniform Code of Military Justice (UCMJ). Other commentators already have addressed those subjects extensively. *See, e.g.*, Joseph E. Ross, *The Military Justice Act of 1968: Historical Background*, 23 JAG J. 125 (1969) *reprinted in* MIL. L. REV. BICENT. ISSUE 273 (1975); Frederick B. Wiener, *American Military Law in Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1 (1989); Earnest L. Langley, Comment, *Military Justice and the Constitution—Improvements Offered by the New Uniform Code of Military Justice*, 29 TEX. L. REV. 651 (1951).

[3] *See, e.g.*, United States v. Scaff, 29 M.J. 60 (C.M.A. 1989); United States v. Burnett, 27 M.J. 99 (C.M.A. 1988); United States v. Griffith, 27 M.J. 42 (C.M.A. 1988).

[4] Act of Aug. 29, 1916, 39 Stat. 619 [hereinafter 1916 Articles].

[5] *See* Wiener, *supra* note 2, at 17.

[6] 1916 Articles, *supra* note 4, art. 17.

[7] MANUAL FOR COURTS-MARTIAL, United States, ¶ 99 (1917).

[8] *Id.* ¶ 96 (requiring a judge advocate to inform an accused of the charges and to advise the accused of his rights to counsel, to testify in his own defense, and to have a copy of the charges).

[9] *See id.* ¶ 94.

[10] Act of June 4, 1920, 41 Stat. 759 (codified at 10 U.S.C. §§ 1471-1953 (1922) (repealed)) [hereinafter 1920 Articles]. The 1920 Articles detailed counsel to represent the accused, required automatic appellate review, and gave the accused the right to receive a copy of the record of trial. *See* Wiener, *supra* note 2, at 24-25.

[11] 1920 Articles, art. 8.

[12] *Id.*

[13] *Id.* art. 31.

would increase soldiers' rights and would insulate the military justice system from unlawful command influence.[14] These criticisms impelled Congress to promulgate the 1948 Articles of War.[15]

The 1948 Articles provided that a law member had to be an officer of the JAGD or a licensed attorney serving as a commissioned officer on active duty.[16] It forbade a court-martial from receiving evidence, or voting on findings or sentence, in the law member's absence.[17] Law members continued to rule on interlocutory questions. With two exceptions, their rulings were final.[18] Law members also instructed courts-martial on certain fundamental precepts of law before deliberations,[19] deliberated with the members (except in closed sessions), and voted as members of the courts to which they were detailed.[20] A law member under the 1948 Articles, however, still was not the independent arbiter for which society clamored. Accordingly, in 1950, Congress introduced far-reaching changes to the military justice system by enacting the Uniform Code of Military Justice (UCMJ).[21]

The UCMJ was the most significant step in the creation of a military trial judiciary. The congressional debate over UCMJ articles 26 and 51 centered on extensive discussions of the similarities between law officers and civilian judges. Professor Edmund Morgan, chairman of the UCMJ drafting committee, was the "most persistent and vocal advocate of the law officer as a judge concept."[22] During his testimony before members of the House Armed Services Committee, Professor Morgan repeatedly declared that a law officer should act like a judge in a civilian court.[23] The provisions of the UCMJ ultimately reflected this belief.

As originally enacted, the UCMJ required a convening authority to appoint a legally qualified law officer for each court-martial.[24] This officer would serve independently of the court members.[25] The UCMJ empowered the law officer to rule on interlocutory questions, to instruct the members of courts-martial,[26] and to consult with the court outside the presence of the accused and counsel.[27] Unlike the 1948 Articles of War, the UCMJ also authorized law officers to rule on the finality of challenges.[28] Several commentators subsequently asserted that Congress actually did not intend to equate law officers with civilian judges.[29] Their claims, however, soon were rendered irrelevant by a volley of decisions that the Court of Military Appeals issued shortly after Congress enacted the UCMJ.

"The legislative background of the Uniform Code makes clear beyond question Congress' conception of the law officer as [a] judge . . . ."[30] The Court of Military Appeals expressed this dogma repeatedly, occasionally adding that one reason for the court's own existence was to enforce Congress's intent by upholding the judicial status of law officers.[31] The court

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[14] *See generally* WILLIAM T. GENEROUS, JR., SWORDS AND SCALES (1973).

[15] Act of June 24, 1948, 62 Stat. 604 [hereinafter 1948 Articles].

[16] *Id.* art. 8. The second paragraph of article 8 provided,

> [T]he authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Department or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and certified by the Judge Advocate General to be qualified for such detail . . . .

[17] *Id.* ("no general court-martial shall receive evidence or vote upon its findings or sentence in the absence of the law member regularly detailed").

[18] *Id.* art. 31. The two exceptions were motions for findings of not guilty and questions as to the sanity of the accused. *See id.*

[19] *Id.* The law member reminded the members that the Government bears the burden of proof and instructed them on the accused's presumption of innocence, the standard of proof beyond a reasonable doubt, and lesser-included offenses. *See id.*

[20] *Id.* art 8.

[21] *See* Pub. L. No. 81-506, 64 Stat. 127 (1950).

[22] Robert E. Miller, *Who Made the Law Officer a "Federal Judge"?*, 4 MIL. L. REV. 39, 41 (1959).

[23] *Uniform Code of Military Justice: Hearings of H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 602-03 (1949), *reprinted in* 1 HOUSE ARMED SERVICES COMM., INDEX AND LEGISLATIVE HISTORY TO THE UNIFORM CODE OF MILITARY JUSTICE, 1950 at 70-71 (1950) [hereinafter *Hearings*].

[24] UCMJ art. 26(a) (1952) (amended 1968).

[25] *Id.*

[26] *Id.* art. 51.

[27] *Id.*

[28] *Id.* art. 41.

[29] *See generally* Miller, *supra* note 22; *Hearings, supra* note 23, at 785.

[30] United States v. Berry, 2 C.M.R. 141, 147 (C.M.A. 1952).

[31] *See, e.g.*, United States v. Keith, 4 C.M.R. 85, 88 (C.M.A. 1952).

consistently expanded the powers of law officers. For example, it held that the UCMJ imposed a duty on a law officer to control criminal proceedings.[32] Accordingly, it ruled that a law officer could instruct members on the inferences to be drawn from evidence.[33] Similarly, the court found that a law officer could declare a mistrial, even though no provision in the UCMJ or the *Manual for Courts-Martial* expressly authorized a law officer to do so.[34] The court also recognized a law officer's power to dismiss multiplicious specifications, even after the members had announced their findings.[35] It opined that the law officer's authority to dismiss a redundant specification essentially mirrored the authority of a civilian judge.[36] In only one case did the Court of Military Appeals limit the power of law officers. In *United States v. Keith*,[37] the court held that a law officer erred when he conferred with the court-martial out of the presence of the accused and counsel. Significantly, the court noted that the law officer's conduct did not comport with the conduct that would have been expected of a civilian judge in a similar situation.[38]

The Court of Military Appeals set the stage for law officers to exercise powers like those of civilian judges. The Military Justice Act of 1968[39] was the next major step in the evolution of the military judge.

Law Officers Become Military Judges

The Military Justice Act of 1968, like previous major revisions of the military justice system, reflected wartime criticisms that the system lacked individual procedural safeguards and that unlawful command influence had poisoned the fairness of courts-martial.[40] Congress concluded that the military justice system needed a substantial overhaul to convince the public that the system actually protected the rights of accused service members. One way to accomplish this goal was to align the military justice system more closely with the civilian system.

The Act's drafters asserted that amendments to UCMJ articles 39 and 51 would conform military criminal procedure to the procedures applicable in United States district courts.[41] Senator Sam Ervin stated that the purpose of the Military Justice Act was to designate law officers as military judges and to give them functions and powers more closely allied to those of federal civilian judges.[42] Similarly, Major General Kenneth J. Hodson, then The Judge Advocate General of the Army, believed that the Act would give a military judge substantially the same responsibilities and authority as a civilian trial judge.[43]

In many ways, Senator Ervin and General Hodson were correct. The Military Justice Act of 1968 established an independent trial judiciary, provided for the detailing of a military judge to preside over each court-martial,[44] and adopted a procedural provision—similar to provisions in civilian practice—that permitted an accused to request a trial by judge alone.[45] The Act also enumerated specific powers of the military judge,[46] although this list by no means was exhaustive.

These changes passed with relative ease. Little, if any, debate arose over the transition from law officer to military judge. The attitude of the public offers the best explanation

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[32] United States v. Jackson, 14 C.M.R. 64 (C.M.A. 1954).

[33] *See* United States v. Biesak, 14 C.M.R. 132 (C.M.A. 1954).

[34] *See* United States v. Stringer, 17 C.M.R. 122 (C.M.A. 1954).

[35] United States v. Strand, 20 C.M.R. 13 (C.M.A. 1955).

[36] *Id.* at 22. Noting that civilian courts recognize the practice of reserving decisions, the Court of Military Appeals found "no compelling reason requiring a different practice in the military." *Id.*

[37] 4 C.M.R. 85 (C.M.A. 1952).

[38] *See id.*

[39] Pub. L. No. 90-632, 82 Stat. 1335.

[40] *See* Ross, *supra* note 2, at 276.

[41] *See generally* UCMJ arts. 39(a), 51 (1968) (amended 1983). Article 39(a) authorized a law officer to call the court into session, without the attendance of the members, to dispose of interlocutory motions raising defenses and objections. This provision resembled Federal Rule of Criminal Procedure 12. The military judge also could use the session to arraign the accused, receive pleas, and perform other procedural acts not requiring the presence of the members. *See id.* art. 39(a).

[42] S. REP. No. 1601, 90th Cong., 2d Sess. 3 (1968).

[43] *Id.* at 278.

[44] UCMJ art. 26 (1968) (amended 1983).

[45] *Id.* art. 16.

[46] *Id.* art. 51.

for the willingness of jurists, legislators, and practitioners to accept the Act. The public increasingly held the Armed Forces in disfavor because of the military's expanding presence in Vietnam. The general public and special interest groups continually pressured Congress to enhance the individual rights of the accused in the military justice system. Many members of Congress and military policy makers felt compelled to appease these critics whenever possible. The introduction of an independent military judiciary would curtail some of these criticisms by establishing authority figures to protect the rights of accused service members.

Perhaps the most significant provision of the Military Justice Act of 1968 empowered a military judge to hold sessions, after referral, outside the presence of the members.[47] The amendment of UCMJ article 39(a), combined with the clear intent of the drafters, inspired the Court of Military Appeals to continue its own expansion of the powers of military judges.

The court came out of the blocks quickly. Holding that Congress had intended a military judge's "detachment from command pressures . . . to be complete,"[48] it declared that the military judge, not the convening authority, controlled a criminal proceeding.[49] The court clarified this position, and further strengthened the independence of military judges, in *United States v. Ware*[50] and *United States v. Ledbetter*.[51] In *Ware*, the court disregarded contrary authority implicit in the 1969 *Manual for Courts-Martial* to hold that, although the UCMJ permitted a convening authority to return a record of trial to the military judge for reconsideration,[52] the convening authority could not reverse the military judge's rulings.[53] In *Ledbetter*, the court considered the efforts of command representatives to inquire into what they perceived to be unduly lenient sentences by a military judge. The Court of Military Appeals condemned this practice, stating, "We deem it appropriate to bar official inquiries outside the adversary process which question or seek justification for a judge's decision unless such inquiries are made by an independent judicial commission."[54]

Military judges used pretrial sessions under newly created UCMJ article 39(a) to resolve preliminary matters, such as motions and objections. Numerous Court of Military Appeals decisions, however, reflected the widespread reluctance of military trial judges to accept article 39(a) as authority empowering trial judges to conduct posttrial sessions.[55] Evidently, many judges read the article narrowly and concluded that it authorized only convening authorities to order posttrial sessions. The Court of Military Appeals believed otherwise. It expressly approved judicial use of posttrial sessions to inquire into allegations of misconduct implicating counsel[56] and court-martial members.[57] The court correctly recognized that civilian judges wield posttrial powers similar to these[58] and that Congress intended military judges to possess the posttrial powers customarily enjoyed by their civilian counterparts.[59] The promulgations of the Military Justice Act of 1983[60] and its implementing executive order—the 1984 *Manual for Courts-Martial*[61]—eliminated any lingering uncertainty about the authority of military judges to conduct posttrial sessions. The 1984 *Manual* specifically authorizes a military judge to hold a posttrial article 39(a) session[62] at any time before the authentication of the record of trial.[63] In a posttrial session, a judge may resolve "any matter [that] substantially affects the legal sufficiency of any findings of guilty or of the sentence."[64]

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[47] *Id.* art. 39(a).

[48] United States v. Nivens, 45 C.M.R. 194, 198 (C.M.A. 1972).

[49] *See id.*

[50] 1 M.J. 282 (C.M.A. 1976).

[51] 2 M.J. 37 (C.M.A. 1976).

[52] *See* UCMJ art. 62 (1968) (amended 1983).

[53] *Ware*, 1 M.J. at 285-87.

[54] *Ledbetter*, 2 M.J. at 43.

[55] *See* UCMJ art. 62 (1968) (authorizing a convening authority to return the record of trial to the court for reconsideration of a ruling or other appropriate action).

[56] *See* United States v. Carr, 18 M.J. 297 (C.M.A. 1984); United States v. Witherspoon, 16 M.J. 252 (C.M.A. 1983).

[57] *See* United States v. Brickey, 16 M.J. 258 (C.M.A. 1983).

[58] *See, e.g.*, FED. R. CRIM. P. 29(c).

[59] *Brickey*, 16 M.J. at 263.

[60] Pub. L. No. 98-209, 97 Stat. 1393 (amending UCMJ arts. 1-140).

[61] MANUAL FOR COURTS-MARTIAL, United States (1984) [hereinafter MCM]. *See generally* Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (1984).

[62] MCM, *supra* note 61, R.C.M. 1102(b) (2).

[63] *Id.* R.C.M. 1102(d).

[64] *Id.* R.C.M. 1102(b) (2).

Recent Developments

In *United States v. Stone*,[65] the Court of Military Appeals recognized the exclusive authority of military judges to inquire into allegations of court member misconduct. Stone alleged that he and several other witnesses had heard laughter from the deliberation room and that, during a recess, one member had expressed to another his belief that Stone was guilty. Stone did not bring these matters to the attention of the military judge. Instead, he first raised the allegations after trial in a letter to the convening authority. The convening authority ordered an investigation to inquire into Stone's claims. The Court of Military Appeals, however, held that Stone had waived any objection to the alleged misconduct by failing to raise the issue during trial.[66] The court further opined that a judicial inquiry, not an administrative investigation, was the appropriate method for resolving an allegation of member misconduct.[67]

Stone confirmed that the powers of a military judge do not end when the judge adjourns the court. It also echoed a tenet raised in several of the court's earlier decisions under the 1969 *Manual for Courts-Martial*, stating that court member misconduct is an appropriate subject for a posttrial article 39(a) session.[68]

The Court of Military Appeals consolidated all the issues related to expanding and "civilianizing" the office of military judge in *United States v. Griffith*.[69] A special court-martial with officer members convicted Griffith for wrongfully using LSD. The trial judge denied a defense motion for a finding of not guilty at the close of the Government's case. After the members announced the sentence and departed the courtroom, the military judge stated on the record that he did not believe that the evidence supported the findings. He urged the convening authority and the reviewing authorities to examine the evidence closely, emphasizing that, under current procedural rules, he was "powerless to overturn the verdict or to entertain a motion for a directed verdict or a finding of not guilty after the general verdict [had] been returned."[70]

In reaching this decision, the trial judge correctly interpreted the plain language of Rule for Courts-Martial (R.C.M.) 917.[71] Nevertheless, the Court of Military Appeals disagreed with the judge's conclusion. The court held that a military judge may take remedial action after the court-martial has rendered a verdict if, before authenticating the record of trial, he or she discovers any error—including legally insufficient evidence—that has prejudiced the rights of the accused.[72] The court doubted that other potential posttrial remedies, such as review by the convening authority or by appellate courts, would be adequate to provide the necessary relief.

Griffith aligned the powers of military judges more closely with the powers granted to civilian judges under the Federal Rules of Criminal Procedure.[73] Unlike R.C.M. 917, Federal Rule of Criminal Procedure 29(b) allows a judge to reserve ruling on a motion for a finding of not guilty until after the jury returns a verdict. *Griffith* affords military judges the same power to act after findings. Significantly, however, the Court of Military Appeals did not extend its ruling to allow a military judge to consider the weight of the evidence, as a civilian judge may do under the Federal Rules of Criminal Procedure.[74] The court obviously—and appropriately—wanted to avoid empowering a military judge to act as a "thirteenth juror."[75] Despite this limitation, the decision in *Griffith* markedly expanded the power of military judges to entertain motions for findings of not guilty.

Over the past few years, the court also has examined the contempt powers of military judges. In *United States v. Burnett*,[76] the military judge initiated contempt proceedings against the accused's civilian defense counsel. The judge

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[65] 26 M.J. 401 (C.M.A. 1988).

[66] *See id.* at 403.

[67] *See id.*

[68] *See* United States v. Carr, 18 M.J. 297 (C.M.A. 1984); United States v. Witherspoon, 16 M.J. 252 (C.M.A. 1983).

[69] 27 M.J. 42 (C.M.A. 1988).

[70] *Id.* at 47.

[71] "The military judge, on motion by the accused or *sua sponte*, shall enter a finding of not guilty on one or more offenses charged after the evidence on either side is closed and *before* findings on the general issue of guilt are announced." *See* MCM, *supra* note 61, R.C.M. 917(a) (emphasis added).

[72] *See Griffith*, 27 M.J. at 47.

[73] *See, e.g.*, FED. R. CRIM. P. 29.

[74] FED. R. CRIM. P. 33.

[75] *See* 27 M.J. at 48. The court did not overturn the conviction because the issue concerned the credibility of the witness, which was a matter for the court members—not the judge—to decide. *See id.*

[76] 27 M.J. 99 (C.M.A. 1988).

based the proceedings on the counsel's "disruptive words" and disorderly conduct.[77] Pursuant to R.C.M. 809,[78] the judge suspended the trial on the merits and held immediate contempt proceedings. The members who heard the contempt charge were the same members who were trying the accused. After the members found the counsel guilty of contempt, the trial on the merits continued. The military judge declined the defense counsel's request for a mistrial and refused to allow the defense counsel to withdraw. The members subsequently convicted the accused and sentenced him to a dishonorable discharge and confinement for four years.

The Court of Military Appeals remanded *Burnett* to the Army Court of Military Review to determine whether the decision to hold the contempt proceeding during the court-martial had prejudiced the accused.[79] The opinion, however, implicitly expanded the powers of military judges by recognizing that a judge may conduct contempt proceedings personally, even in a case tried by court members.[80] The opinion also authorized a military judge to delay contempt proceedings until the conclusion of a case, relying again on the analogy of a military judge to a Federal civilian judge.[81] Deferring contempt proceedings removes the possibility of prejudice to the accused and conforms military justice procedures to federal civilian practice.[82]

Seeking again to define the proper scope of a posttrial article 39(a) session, the Court of Military Appeals held in *United States v. Scaff*[83] that a trial judge may consider newly discovered evidence in a posttrial session. A military judge convicted Scaff, contrary to his plea, for his wrongful use of cocaine. After trial, Scaff asked the judge to conduct an article 39(a) session to consider an affidavit from a woman who stated that she had put cocaine in Scaff's drink without his knowledge. At the posttrial session, the military judge ordered the Government to produce the witness. The witness had accepted a government subpoena, but she ultimately declined to appear because the convening authority refused to fund her travel expenses.[84] The trial judge acknowledged that he was inclined to dismiss the charges, but stated that he did not believe he had the authority to do so.

The Court of Military Appeals held that UCMJ article 39(a) empowered the trial judge to consider the newly discovered evidence and, if warranted, to set aside the findings.[85] The court also criticized the convening authority for negating the order of a military judge, suggesting that this conduct might constitute contempt.[86] Although the court ultimately found no contempt in the instant case, the message it meant to convey is very clear. The Court of Military Appeals will continue to protect the independence of the judiciary and to uphold the authority of military judges.

In a subsequent case, the court shifted its focus from the posttrial powers of military judges to a judge's power to take an active role during a trial. The court approved the action of a trial judge who interpreted the provisions of a pretrial agreement in *United States v. Gibson*.[87] In *Gibson*, the accused pleaded not guilty to charges of forcible sodomy on his son and indecent acts with his daughter. He pleaded guilty to other acts involving his children and, as part of a pretrial agreement, waived evidentiary objections to the children's testimonies on the remaining charges. This waiver originated with the defense. Without much apparent thought, the defense counsel accepted the waiver as a blanket renunciation of the accused's right to object to any evidence that might be introduced through the children's testimonies. The military judge, however, concluded that this provision was overbroad and unenforceable. Accordingly, the judge interpreted the provision to pertain only to confrontation and hearsay objections.

[77] *Id.* at 102.

[78] *See* MCM, *supra* note 61, R.C.M. 809.

[79] *Burnett*, 27 M.J. at 108.

[80] *See id.* at 106-07.

[81] *Id.* at 107.

[82] *See* Sacher v. United States, 343 U.S. 1, 10 (1952) (recognizing the benefits of deferring a contempt proceeding until after the trial to avoid the possibility of prejudice to the defendant).

[83] 29 M.J. 60 (C.M.A. 1989).

[84] The staff judge advocate (SJA) neglected to brief the convening authority that the witness had departed the state. *Id.* at 63. The convening authority evidently declined to fund the witness's travel because he believed that the witness still was in the local area—not because he wished to thwart the judge's ruling. *Id.* The convening authority's reliance on inaccurate advice from the SJA was a mitigating factor in the court's consideration of the convening authority's action. *See id.* at 67.

[85] *Id.* at 65. The court cited R.C.M. 1102(b)(2) as authority that the judge could consider newly discovered evidence. It opined, however, that even absent the provisions of R.C.M. 1102, UCMJ article 39(a) would empower a military judge to consider newly discovered evidence and take appropriate action. *Id.* at 66.

[86] *Id.*

[87] 29 M.J. 379 (C.M.A. 1990).

Both counsel agreed to the modified provision. The Court of Military Appeals upheld the judge's decision to intervene and to interpret the agreement.[88] It noted that, had the military judge not interpreted the clause restrictively, the pretrial agreement would not have survived at trial or on appeal.[89]

Gibson is significant because the Court of Military Appeals upheld a judicial interpretation of the terms of an agreement to which the trial court was never a party. Although the pretrial agreement existed only between the accused and the convening authority, the court allowed the military judge to give effect to this agreement. Accordingly, *Gibson* further enhanced the abilities of military judges to control criminal proceedings and to assert judicial authority proactively.

The power of a military judge to orchestrate the flow of events at a court-martial came to fruition in *United States v. Helweg*.[90] Helweg entered into a pretrial agreement with the convening authority. Before entering his guilty pleas, however, he wanted the judge to rule *in limine* on the admissibility of certain pretrial statements made by the victim and her brother. The judge refused to hear Helweg's motion *in limine*, but indicated that he would consider the motion as an objection to the evidence if Helweg pleaded not guilty at the trial, which was to be conducted judge-alone. Not wanting to lose the protection of his pretrial agreement, Helweg pleaded guilty without litigating the evidentiary issues. The Court of Military Appeals affirmed the judge's actions, stating, "A judge is not obligated, in the judge-alone format, to hear the case twice, and often it is preferable to make rulings in the context of the broader case evidence, rather than in a partial vacuum."[91] This decision conclusively demonstrated the authority of a military judge to control a court-martial, even to the extent of forcing an accused to enter a certain plea or to forego raising evidentiary matters.

The Court of Military Appeals also implicitly recognized the enhanced role and authority of the military judge in *United States v. Rhea*.[92] An ethical dilemma confronted Rhea's defense attorneys. Physical evidence in their possession implicated their client. They could not determine their ethical obligations concerning this evidence. Eventually, they sought guidance from the military judge in an *ex parte, in camera* proceeding. Commenting on the propriety of the actions of the counsel and the military judge, the Air Force Court of Military Review stated, "Military judges have the inherent authority to resolve issues of the ethical obligations of counsel."[93] The Court of Military Appeals agreed, adding that the defense counsel and the military judge in the instant case should "be commended, not condemned."[94]

The court recently reemphasized the independence of military judges. In *United States v. Mabe*,[95] the Chief Trial Judge of the Navy wrote a memorandum to one of his chief circuit judges in which he commented on the circuit judge's apparently lenient sentencing in judge-alone trials. Affirming the decision of the Navy-Marine Corps Court of Military Review, the Court of Military Appeals held that the memorandum constituted unlawful command influence. The court stated expressly that a military judge is not the "alter ego of the Judge Advocate General or his designee,"[96] adding that a judge's superior officer may not use the officer efficiency report system to voice complaints about the judge's decisions on sentencing.[97]

What's Next?

By expanding the powers of military judges, the Court of Military Appeals has helped to establish the authority and independence of the military trial judiciary. The court's decisions, however, raise the following two questions: How far—and in what direction—will the current trend take the judiciary?

In future decisions, the Court of Military Appeals well may rule that military judges may act on cases before referral. Increasing judicial responsibilities in this manner will not diminish the role of commanders in the military justice system. Commanders, not judges, will continue to prefer charges and ensure the timely administrative processing of each case. To insert the military judge into the case before referral comports with the trend to give military judges powers akin to those of the civilian bench. More significantly, it may improve the public's perceptions of the fairness of the military justice system.

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[88] *Id.* at 382.

[89] *See id.* at 382 & n.2.

[90] 32 M.J. 129 (C.M.A. 1991).

[91] *Id.* at 133.

[92] 33 M.J. 413 (C.M.A. 1991).

[93] United States v. Rhea, 29 M.J. 991, 995 (A.F.C.M.R. 1990), *rev'd on different grounds and remanded*, 33 M.J. 413 (C.M.A. 1991).

[94] *Rhea*, 33 M.J. at 419.

[95] 33 M.J. 200 (C.M.A. 1991).

[96] *Id.* at 205.

[97] *Id.* at 206.

The Court of Military Appeals eventually may grant military judges sole authority to sentence convicted accused. It also may authorize judges to resolve pretrial confinement issues, and issues arising at UCMJ article 32 hearings, when these issues actually arise.[98] Finally, the court might hold that military judges must be appointed to fixed terms of office.[99] Each of these changes has inherent advantages and disadvantages whose analyses would exceed the scope of this article. Clearly, however, any changes the Court of Military Appeals may consider will have to balance the active roles sought for military judges against the need to preserve the military justice system as a legitimate tool of commanders. One realistically may suggest that if these and other changes are forthcoming, they will follow the trend of giving military judges the status and powers of their civilian counterparts.

Conclusion

The military judge's train left the station in 1969 with the Court of Military Appeals at the throttle. Since then, the court continually has expanded the authority of military judges and has given no indication that this trend will cease. Whether the military ultimately will have a judiciary whose powers mirror those of federal civilian trial courts is an open question. The likely answer lies in an analysis of the history of the military judge and the court's perception of the role of the trial judiciary in the American military justice system. Major Tate and Lieutenant Colonel Holland.[100]

Contract Law Notes

Contractor Challenges Own Certification—And Wins

A recent decision by the Court of Appeals for the Federal Circuit has opened a Pandora's box of certification issues. It apparently would allow a contractor to question the validity of a certification after a fact finder has considered the underlying claim fully on the merits. In *Universal Canvas, Inc. v. Stone*,[101] the Federal Circuit held that the Armed Services Board of Contract Appeals (ASBCA or Board) lacked jurisdiction over the appellant's claim because that claim was certified by an improper certifying official. Rulings that individuals are improper certifying officials are not unusual. In this case, however, the contractor, not the Government, asserted that its own certification was improper, in hopes of voiding an adverse decision by the ASBCA.[102]

After losing before the ASBCA on all issues, Universal Canvas filed a motion with the Federal Circuit, asking the court to vacate the Board's decision for lack of jurisdiction. It based this motion on the Federal Circuit's interpretation of certification requirements in *United States v. Grumman Aerospace Corp.*[103]

Mr. Joe Flores, Universal Canvas's vice president for finance, originally certified the appellant's claim. Flores worked at the appellant's main facility, which was located approximately 150 miles from the site on which the appellant performed the contract giving rise to the claim. The ASBCA enumerated several reasons to explain why it believed the certification to be proper. It mentioned that Universal Canvas was a small business with only three vice presidents, that Flores was the only vice president at the appellant's main facility, that Flores reported directly to the president of the company, and that he had provided information to the Government supporting the appellant's claim for equitable adjustment.

The Federal Circuit, however, ruled that the certification did not meet the requirements of *Federal Acquisition Regulation* (*FAR*) 33.207.[104] Noting that Flores was the appellant's vice president of accounting, the court concluded that he had overall responsibility only for the appellant's financial affairs, not for the overall conduct of the appellant's business.[105] It analogized the instant case to *Ball, Ball, & Brosamer, Inc. v. United States* (*Ball*).[106] In *Ball*, the Federal

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[98] The Army Trial Judiciary already recognizes a military judge's ability to act on pretrial confinement issues before referral. *See* U.S. ARMY TRIAL JUDICIARY, TRIAL JUDICIARY STANDARD OPERATING PROCEDURES, ch. 15, para. 4*a* (16 Feb. 1989) ("all military judges may review pretrial confinement prior to referral based upon request by the [G]overnment, defense counsel, or the soldier involved").

[99] The issue of judicial tenure presently is pending before the Court of Military Appeals. *See* United States v. Graf, 32 M.J. 809 (N.M.C.M.R. 1990), *petition for review granted*, 34 M.J. 169 (C.M.A. 1991); *cf.* United States v. Toro, 34 M.J. 506 (A.F.C.M.R. 1991) (military judge need not have tenure); United States v. Loving, 34 M.J. 956 (A.C.M.R. 1992) (military judge need not have fixed term of office).

[100] Lieutenant Colonel Holland, a military judge assigned to the Second Judicial Circuit, Fort Stewart, Georgia, previously was the senior instructor, Criminal Law Division, TJAGSA.

[101] No. 92-1061, 1992 WL 220181 (Fed. Cir. Sept. 14, 1992).

[102] The case reached the court on an appeal from a decision of the ASBCA, which had denied Universal Canvas's claim for an equitable adjustment and its subsequent motion to vacate the adverse judgment.

[103] 927 F.2d 575 (Fed. Cir. 1991).

[104] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 33.207 (31 Dec. 1991) [hereinafter FAR].

[105] *Universal Canvas, Inc.*, 1992 WL 220181, at *2 to *3. That Universal Canvas's two other vice presidents worked at the plant where performance of the instant contract occurred may lend credence to this finding.

[106] 878 F.2d 1426 (Fed. Cir. 1989).

Circuit held that a contractor's "chief cost engineer" lacked authority to certify the contractor's claim—even though this senior corporate official reported directly to the contractor's president and was charged with supervising and administering all "cost & claim aspects of the performance and completion of all . . . contracts."[107] In the instant case, the court remarked that Flores' title, like the title of the certifying official in *Ball*, was inconsistent with the exercise of general corporate authority.[108] It added that the record in *Universal Canvas, Inc.* contained no proof that the vice president for accounting exercised this essential authority.[109] That the parties already had litigated the appeal fully and the appellant was asserting its own improper certification as a basis for setting aside an adverse ASBCA decision made no difference to the court.

Judge Cowen filed a strong dissenting opinion, which eventually may provide the basis for a successful Government appeal of *Universal Canvas, Inc.* Judge Cowen asserted that the issue before the court was whether Universal Canvas had discharged its burden of demonstrating that the ASBCA's decision either was unsupported by substantial evidence or was incorrect as a matter of law.[110] He concluded that the appellant had failed to meet its burden of proof.

Judge Cowen distinguished *Ball* and *Grumman Aerospace* from the instant appeal. He noted that the certifying official in *Ball* was neither a corporate officer, nor a general partner of the corporation.[111] Accordingly, the *Ball* certifier could not have met the basic requirements of *FAR* 33.207(c)(2)(ii), however extensive his corporate responsibility might have been.[112] Flores, however, "unquestionably [was] a corporate officer, and the relevant inquiry [was] only the scope of his corporate responsibility."[113]

Judge Cowen distinguished *Grumman Aerospace*, commenting that the facts of that case were entirely different from those in *Universal Canvas, Inc.*[114] In *Grumman Aerospace*, the certifying official held the title of "senior vice-president and treasurer." The court's opinion in that case, however, does not suggest that the court considered the descriptive title of the certifier to be dispositive.[115] "Instead, the holding in [*Grumman Aerospace*] was based on undisputable evidence that the certifying official [had very limited corporate responsibilities]."[116] Although Judge Cowen agreed with the majority that a "totality of the circumstances" analysis of the certification issue was appropriate, he asserted that the record would not support a determination that Flores lacked the "requisite responsibility to certify the claim."[117]

Judge Cowen also maintained that the majority opinion was inconsistent with the court's holding in *United States v. Newport News Shipbuilding & Dry Dock Co. (Newport News)*.[118] In that case, the ASBCA granted summary judgment for a contractor when the Government offered no evidence to establish that the certifier had lacked the requisite authority.[119] The Federal Circuit affirmed this decision, holding that the Government's statements about the inadequacy of the certification did not create a material issue of fact sufficient to preclude a summary judgment.[120] The court ruled that, when the record contains prima facie evidence of a properly certified claim, the party challenging the certification must present evidence that the officer who certified the claim lacked the authority to do so.[121] Reasoning that *Newport News* required Universal Canvas to proffer evidence that its own certification was inadequate, Judge Cowen concluded that Universal Canvas had failed to comply with the *Newport News* requirements.[122]

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[107] *Id.* at 1427.

[108] *See Universal Canvas, Inc.*, 1992 WL 220181, at *2; *cf.* FAR 33.207(c) (2) (ii).

[109] *See id.*

[110] *Id.* at *5 (Cowen, J., dissenting).

[111] *Id.* at *6.

[112] *See id.*; *see also* FAR 3.207(c) (2) (ii) (stating that an "officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs" may execute a certification).

[113] *Universal Canvas, Inc.*, 1992 WL 220181, at *6.

[114] *See id.*

[115] *See id.*

[116] *Id.* (citing United States v. Grumman Aerospace Corp., 927 F.2d 575, 580 (Fed. Cir. 1991)).

[117] *Id.* at *7.

[118] *Id.* at *6 (citing United States v. Newport News Shipbldg. & Dry Dock Co., 933 F.2d 996 (Fed. Cir. 1991)).

[119] Newport News Shipbldg. & Dry Dock Co., ASBCA No. 36,751 (Apr. 26, 1990) (unpub.).

[120] *See Newport News Shipbldg. & Dry Dock Co.*, 933 F.2d at 999-1000.

[121] *Id.* at 1000.

[122] *Universal Canvas, Inc.*, 1992 WL 220181, at *6.

Judge Cowen agreed with the ASBCA that the certification requirement exists for the sole benefit of the government and that the requirement's purpose is to prevent government contractors from filing fraudulent and unwarranted claims.[123] He opined that Congress did not intend to permit a contractor to use its own failure to certify a claim properly as a basis to set aside a decision on the merits by a board of contract appeals.[124] Judge Cowen averred that a contractor is obligated to file a proper certification in the first instance and that the majority opinion improperly provided a contractor with a second opportunity to prevail on the same claim.[125] He concluded, "I am convinced that the court's holding today is so repugnant to the purpose for which the certification requirement was enacted . . . that [it] should not stand."[126]

Arguably, this decision could reopen many previously decided certification cases. Accordingly, field attorneys should watch for an appeal in which the Government attempts to overturn this ruling. In the meantime, government attorneys and contracting officers should scrutinize all certifications closely and should consider the totality of the circumstances surrounding each certification. They should not rely upon corporate titles alone, but should consider the actual corporate responsibilities of certifying officials. Unfortunately, a contracting activity facing a contractor's claim now may feel obliged to obtain an affidavit, signed by a corporate certifying official, in which the affiant describes his or her areas of responsibility, the corporate structure of the contractor, and the affiant's relationship to the claim, hoping that an appellate court later will not permit the claimant to disavow the affidavits or any prior certifications. Moreover, *Universal Canvas, Inc.* may delay the expedient processing of claims because it essentially requires agencies to conduct *voir dires* of certifying officials to ensure that each claim is certified properly. Major Bean, USAR, and Major Killham.

Comptroller General Limits Incremental Funding of Multiyear Contracts

In a recent decision, the Comptroller General held that, absent special statutory authority, an agency may not fund a multiyear contract for nonseverable services incrementally.[127] Instead, the agency must draw on whatever funds are available when it initially awards the contract to obligate a sum equal to the entire contract price. This decision apparently permits the Department of Defense (DOD) to use incremental funding only for research and development (R&D) and utility services contracts.

The Comptroller General issued the decision at the request of the Department of Agriculture (DOA), which had asked whether it could fund certain contracts incrementally. The contracts in question were research contracts for individual studies that the DOA expected would take more than one year to complete. Each contract was for a single undertaking; the agency could not divide a study into parts having independent values. Accordingly, the services the DOA acquired under the contracts were nonseverable.

The DOA wanted to fund work performed in subsequent years with the subsequent years' appropriations. To accomplish this, it wanted to include the standard limitation of funds clause[128] in each contract. The DOA believed that, by doing so, it not only could avoid obligating funds in excess of current appropriations, but also could avoid obligating funds in advance of future appropriations.[129] It sought the Comptroller General's approval of this practice.

The Comptroller General concluded that each nonseverable service was a bona fide need of the year in which the contract initially was awarded. Unstated, but essential to this conclusion, was the assumption that an agency may obligate only one year's appropriation for a nonseverable requirement. Having chosen to award a contract for a nonseverable requirement in one fiscal year, the agency must fund the contract for that requirement entirely from that year's appropriation. The Comptroller General based this conclusion on the Bona Fide Needs Statute.[130]

The Comptroller General recognized that statutory exceptions exist to this general rule, particularly in funding contracts for defense R&D[131] and utility services.[132] It also recognized that discretionary modifications—that is, increases

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[123] *Id.* at *7.

[124] *See id.*

[125] *See id.*

[126] *Id.*

[127] Incremental Funding of Multiyear Contracts, B-241215, June 8, 1992, 71 Comp. Gen.___, 92-1 CPD ¶ ___.

[128] *See* FAR 52.232-22.

[129] *See* 31 U.S.C. § 1341 (1988).

[130] *Id.* § 1502.

[131] 10 U.S.C. § 2352 (1988).

[132] 31 U.S.C. § 1308 (1988).

in the contract price not enforceable by the contractor as antecedent liabilities—are chargeable against current appropriations.[133] Moreover, the Comptroller General's decision did not discuss, and presumably did not reverse, an earlier decision addressing the funding of overruns.[134] Consequently, agencies may continue to use current appropriations to fund overruns of cost reimbursement contracts containing the limitation of costs clause. Finally, because this decision does not apply to severable services, an agency must continue to charge severable services to the appropriations that are available when the services are performed.

The Comptroller General's decision essentially requires DOD agencies to obtain full funding for all nonseverable services contracts, except for R&D and utilities contracts. By analogy, the DOD must fund all nonseverable supply and construction contracts fully as well. This practice reflects current DOD policy; however, the decision eliminates some exceptions that the DOD policy previously recognized. Henceforth, an exception will be permitted only if it has statutory authorization. Any agency currently funding contracts incrementally should review the Comptroller General's decision and applicable statutory authority to determine whether it may continue this practice. Lieutenant Colonel Jones.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys (LAAs) of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Tax Notes

1992 Federal Tax Forms—Advance Proof Copies

The Internal Revenue Service (IRS) recently released advance proofs of various 1992 federal income tax forms.[135] Publication 1407, *1992 Federal Tax Forms—Advance Proof Copies*, contains advance proofs of Forms 1040, 1040A, 1040EZ, and 2441;[136] Schedules 1, 2, 3, A, B, C, D, E, EIC, F, R, and SE;[137] and the personal exemption and itemized deductions worksheets. The publication also includes the 1992 tax table for Form 1040 and the 1992 tax rate schedules. Tax officers stationed overseas also may be interested in Publication 1407-A,[138] which contains an advance proof of new Form 2555-EZ.[139] Legal assistance attorneys may order these publications by calling the IRS telephone assistance number, (800) 829-3676, or by writing to the following address: Internal Revenue Service, P.O. Box 25866, Richmond, VA 23289-5866. Major Hancock.

Tax Practitioner Program

Legal assistance attorneys organizing annual installation tax assistance efforts[140] might want to order copies of IRS Publication 1045,[141] if they have not received them already. Upon request, the IRS Tax Practitioner Program will send two

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[133] *See* Proper Fiscal Year Appropriation to Charge for Contract and Contract Increase, B-219829, 65 Comp. Gen. 741 (1986).

[134] Environmental Protection Agency—Request for Clarification, B-195732, 61 Comp. Gen. 609 (1982).

[135] *See* INTERNAL REVENUE SERV., PUB. 1407, 1992 FEDERAL TAX FORMS—ADVANCE PROOF COPIES (rev. July 1992).

[136] *See generally* Internal Revenue Serv., Form 1040, U.S. Individual Income Tax Form (1992); Internal Revenue Serv., Form 1040A, U.S. Individual Income Tax Form (1992); Internal Revenue Serv., Form 1040EZ, Income Tax Return for Single Filers with No Dependents (1992); Internal Revenue Serv., Form 2441, Child and Dependent Care Expenses (1992).

[137] *See generally* Internal Revenue Serv., Schedule 1, Interest and Dividend Income for Form 1040A Filers (1992); Internal Revenue Serv., Schedule 2, Child and Dependant Care Expenses for Form 1040A Filers (1992); Internal Revenue Serv., Schedule 3, Credit for the Elderly or the Disabled for Form 1040A Filers (1992); Internal Revenue Serv., Schedule A, Itemized Deductions (1992); Internal Revenue Serv., Schedule B, Interest and Dividend Income (1992); Internal Revenue Serv., Schedule C, Profit or Loss from Business (Sole Proprietorship) (1992); Internal Revenue Serv., Schedule D, Capital Gains and Losses (1992); Internal Revenue Serv., Schedule E, Supplemental Income and Loss (1992); Internal Revenue Serv., Schedule EIC, Earned Income Credit (1992); Internal Revenue Serv., Schedule F, Profit or Loss from Farming (1992); Internal Revenue Serv., Schedule R, Credit for the Elderly or the Disabled (1992); Internal Revenue Serv., Schedule SE, Self -Employment Tax (1992).

[138] *See* INTERNAL REV. SERV., PUB. 1407-A, 1992 FEDERAL TAX FORMS—ADVANCE PROOF COPIES (rev. Aug. 1992).

[139] Internal Revenue Serv., Form 2555-EZ, Foreign Earned Income (1992).

[140] Legal assistance attorneys organizing annual installation tax assistance programs also should consult the *Model Tax Assistance Guide* for general information on organizing and operating an installation tax program. *See* ADMIN. & CIV. L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 275, MODEL TAX ASSISTANCE GUIDE (Sept. 1991). This text includes a reprint of Mr. Stephen W. Smith's article, "Running an Effective Tax Assistance Program," which appeared last year in *The Army Lawyer*. *See* Stephen W. Smith, *Running an Effective Tax Assistance Program*, ARMY LAW., Sept. 1991, at 14.

[141] INTERNAL REVENUE SERV., PUB. 1045, Information for Tax Practitioners (1992).

information copies of major tax forms and schedules, one copy of instructions and publications, and labels for mailing IRS district newsletters to tax practitioners. Publication 1045 includes Form 3975,[142] which a tax practitioner must complete and mail to the IRS to receive the newsletter published by the practitioner's tax district. Under the Tax Practitioner Program, a legal office filing Form 3975 may order one copy of Publication 17,[143] and one copy of Package X—a multi-volume publication containing numerous reproducible forms and instructions—for each attorney in the office. Legal assistance attorneys may order Publication 1045 by calling the IRS telephone assistance number, (800) 829-3676, or by writing to the following address: Internal Revenue Service, P.O. Box 25866, Richmond, VA 23289-5866. Major Hancock.

After-Action Report on Army Tax Assistance Services

Army lawyers who assist clients with their income taxes each year must submit annual reports to the Legal Assistance Division, Office of The Judge Advocate General. Reports submitted by Army legal offices in the United States are due at the Legal Assistance Division by 1 June; reports from legal offices outside the United States must arrive there by 1 July.

The reports are consolidated and the figures obtained are reported to the IRS. The IRS uses the figures to justify its Volunteer Income Tax Assistance (VITA) Program. The Legal Assistance Division also uses these statistics—and the comments provided by each legal office—in discussions with Army-Air Force Exchange Service (AAFES) officials about the conduct of commercial tax preparation services on Army installations. The comments of Army legal offices were particularly important in AAFES's recent decision to protect the interests of soldiers and their families by retaining existing contract provisions—and by adding new protective provisions—to agreements with commercial tax preparers. The Legal Assistance Division will relate more information on this subject in a subsequent note.

The Legal Assistance Division compiled the following significant statistics from the after-action reports that Army legal offices submitted in 1992:

Part-time and Full-time Tax Assistance Providers

Attorneys/Clerks/Paralegals	513
Unit Tax Advisors	4630
Volunteers	487

Total Number of Tax Returns Prepared

Attorneys/Clerks/Paralegals	
State	20,825
Federal	44,498
Unit Tax Advisors	
State	20,966
Federal	89,996
Volunteers	
State	15,430
Federal	27,787
Overall Totals	
State	57,221
Federal	162,281

Total Number of Returns Filed Electronically: 65,000

Army legal offices commented most frequently on the following five topics:

(1) IRS VITA Classes. Last year, these classes were conducted too late to allow offices to prepare adequately for the tax season. Moreover, offices assisting clients stationed overseas found that the classes did not concentrate enough on foreign income issues. The Army presently is addressing these concerns in meetings with IRS officials.

(2) The Earned Income Credit (EIC). Some offices found that VITA instructors failed to cover the EIC in sufficient detail to ensure that unit tax advisors and volunteers understood it well enough to help soldiers. Some offices also found that the commercial tax preparers on their installations did not know how to compute the EIC properly and were advising soldiers incorrectly about their eligibilities for the credit. The latter problem occurred frequently overseas. The Army presently is addressing the first issue in meetings with IRS officials. The second issue was discussed thoroughly with AAFES officials.

(3) Commercial Tax Preparers. Some offices reported no problems with commercial tax preparers on their installations. Many offices, however, complained that commercial preparers failed to comply with the preparers' contracts with AAFES. In particular, they asserted that the preparers had neglected to post required signs, had not provided the required questionnaires to staff judge advocate's offices, and incorrectly had advised members of the military community. The numerous comments received on this issue will be addressed in a subsequent article.

(4) Puerto Rican Income Tax Return Problems. These problems relate to the implementation of Puerto Rican income tax withholding in late 1991.[144] Several messages from this office have provided guidance on these problems.

(5) Deployment-Related Tax Problems. Many soldiers who deployed to Southwest Asia during Operation Desert Storm experienced income tax problems, particularly in the

[142] Internal Revenue Serv., Form 3975, Tax Practitioner Annual Mailing List Application and Order Blank (1992).

[143] INTERNAL REVENUE SERV., PUB. 17, YOUR FEDERAL INCOME TAX (1992).

[144] *See generally* TJAGSA Practice Note, *Income Tax Withholding for Puerto Rico Residents*, ARMY LAW., Jan. 1992, at 48.

area of improper withholding. Attorneys may find IRS Publication 945[145] to be helpful when advising these soldiers. In responding to a notice from an IRS center about a tax payment deficiency, a soldier who served in the Persian Gulf during the hostilities with Iraq should write the words "DESERT STORM" in red across the top of his or her letter and across the top of any tax return or other document he or she submits with the letter. Some IRS centers reported that problems arose when letters with "DESERT STORM" written on them became separated from the tax returns to which they pertained. Tax officials noted that when this occurred, IRS personnel processed the returns normally because the returns lacked notations indicating the taxpayers had served in the Persian Gulf combat zone. Major Webster.[146]

Family Law Note

*Divorced Retirees Get Relief from Reopened Pre-*McCarty *Divorce Decrees*

In *McCarty v. McCarty*,[147] the Supreme Court held that military retired pay could not be divided as marital property in a divorce proceeding unless a federal statute specifically authorized this division. Two years later, Congress responded to *McCarty* by enacting the Uniformed Services Former Spouses' Protection Act (USFSPA).[148] The USFSPA permits a state court to divide "disposable military retired pay"[149] as marital property if state law authorizes the court to do so.[150]

Congress belatedly expressed its intent that the courts should apply the USFSPA only prospectively.[151] Some state courts, however, continued to reopen pre-*McCarty* cases to award shares of military retired pays to the former spouses of military retirees.[152]

To prevent this practice, Congress amended the USFSPA. Section 555 of the National Defense Authorization Act for Fiscal Year 1991[153] forbids a court from reopening a final decree of divorce, dissolution, annulment, or legal separation to order a subsequent division of military retired pay if that decree was issued before the Supreme Court decided *McCarty*.[154] The amendment further provides that, when a court has reopened a pre-*McCarty* decree to divide a military pension, the retiree will not have to make further payments pursuant to that order after 5 November 1992.

A retiree who is paying a portion of his or her military pension directly to his or her ex-spouse in accordance with a reopened, pre-*McCarty* divorce decree simply may cease payments after 5 November. A retiree subject to the USFSPA's direct pay provisions,[155] however, must contact the Defense Finance and Accounting Service[156] (DFAS) and request that payments be halted. Unfortunately, the DFAS still has not promulgated procedures for a retiree to request the termination of direct payments to his or her ex-spouse. To minimize processing delays, a termination request should disclose the retiree's social security number and should include certified copies of both the original (pre-*McCarty*) divorce decree and the subsequent, reopened decree. Major Connor.

Consumer Law Notes

Refinancing Home Loans

For a number of months now, homeowners have been tempted to refinance their existing home loans. The Federal Reserve has held the discount rate—that is, the interest rate the Federal Reserve charges financial institutions for short-term loans—to a twenty-year low. Consequently, mortgage rates now are much lower than they have been for years.

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[145] INTERNAL REVENUE SERV., PUB. 945, TAX INFORMATION FOR THOSE AFFECTED BY OPERATION DESERT STORM (1991).

[146] Deputy Chief, Legal Assistance Division, Office of The Judge Advocate General.

[147] 453 U.S. 210 (1981).

[148] 10 U.S.C. § 1408 (1988).

[149] *Id.* § 1408(a)(4).

[150] *Id.* § 1408(c)(1).

[151] *See* H.R. REP. No. 563, 100th Cong., 2d Sess. 256 (1988) ("Although the Congress cannot preclude state courts from reopening the pre-*McCarty* cases, Congress did not intend this to happen").

[152] *See* H.R. CONF. REP. No. 923, 101st Cong., 2d Sess. 609 (1990).

[153] *See* Pub. L. No. 101-510, 104 Stat. 1485 (1990).

[154] *Id.*, § 555, 104 Stat. at 1569 (amending 10 U.S.C. § 1408 (1988)); *see also* 10 U.S.C.A. § 1408 (West Supp. 1992). The Supreme Court decided *McCarty* on 25 June 1981. *See McCarty*, 453 U.S. at 210.

[155] 10 U.S.C.A. § 1408(b), (d) to (e) (West 1983 and Supp. 1992).

[156] Army retirees should send their requests to the Defense Finance & Accounting Service, Indianapolis Center, ATTN: DFAS-I-GG, Indianapolis, IN 46249.

Some experts believe that the Federal Reserve's efforts to stimulate the economy will cause mortgage rates to drop even lower. Timing a decision to refinance a loan to ensure that the borrower obtains the lowest possible mortgage rate is difficult. Nevertheless, a methodology exists that LAAs can use to determine whether their clients should refinance their home loans.

In part, the nature of this analysis depends on the homeowner's reason for refinancing. A homeowner may refinance a home loan for a number of reasons—he or she may want to reduce the interest rate; to shorten the time required to pay off the loan; to provide certainty in the amounts of monthly payments if the homeowner currently has an adjustable rate mortgage; to consolidate personal loans within the home mortgage, so that the owner can deduct more of the interest on the owner's indebtedness;[157] or to pull equity out of the home to be used for other purposes. Any of these reasons can justify a decision to refinance.

When one considers refinancing to save money, deciding whether to refinance is relatively simple. Some experts have suggested that refinancing is a sound decision if the differential between the current interest rate and the rate that may be obtained through refinancing is at least two percent. That rule of thumb oversimplifies the issue. The decision actually should rest on four variables: (1) the interest rate on the existing mortgage, including any anticipated changes if the current mortgage has an adjustable rate; (2) the interest rate the homeowner can obtain by refinancing; (3) the closing costs that the homeowner must incur to refinance the loan; and (4) the homeowner's best estimate of how long the mortgage will be held. The data for the first three factors is readily available and generally certain. The fourth factor is speculative. Unlike many other homeowners, soldiers rarely remain in their current locations permanently. Indeed, a soldier normally will remain at one station for only a few years. Accordingly, refinancing often is less attractive to active duty soldiers than it would be for civilians; although, in many circumstances, soldiers still may find refinancing to be prudent.

The following example illustrates the interplay between the four key factors. Assume that Captain Jones has an existing home mortgage of $100,000, amortized over thirty years at an interest rate of eleven percent. His monthly payment for principal and interest is $952.33.[158] Assume also that a homeowner currently may obtain a home mortgage at an annual rate of 8.5%, amortized over thirty years, if the borrower pays a total of 1.5 "points" and a one percent loan origination fee. (The lender charges points for making the loan at a specified interest rate; one point equals one percent of the principal of the loan to be obtained.) The other essential datum is the approximate amount of the additional closing costs that Captain Jones must incur to refinance. Closing costs generally include an appraisal fee, survey cost, recording costs, attorneys' fees, title insurance charges, and credit reports.[159] The exact amount of these charges may vary, but the lender must provide the borrower with a good-faith estimate of the total expense when the borrower applies for refinancing. For the purposes of this example, assume that the closing costs—other than points—total one percent of the loan value ($1000). Accordingly, the total cost of obtaining the new financing would be $3500.[160] The new loan would provide for monthly payments of $768.92. Captain Jones would save $183.41 ($952.33-$768.92) each month. Consequently, Jones would recover the $3500 refinancing cost in nineteen months, exclusive of tax considerations.[161] In this analysis, Captain Jones would be wise to refinance if he were relatively certain that he would remain at his present duty station for at least eighteen months.[162]

If, in our example, we assume that the lender is going to charge three points—rather than 1.5 points—in addition to the one percent loan origination fee, then Jones' total refinancing expenses would increase to $5000. Jones then would need twenty-seven months to recover the refinancing costs through the $183.41 he would save each month.

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[157] Personal indebtedness is not deductible. I.R.C. § 461(g) (1988). Interest paid on a loan secured by a principal residence, on the other hand, normally is deductible. *Id.* Some limitations exist on the deductibility of interest on a home equity debt to the extent that the home mortgage exceeds $100,000; however, a detailed discussion of these limitations would exceed the scope of this note.

[158] In calculating the benefit of refinancing, an LAA should not consider the amounts the homeowner presently pays for taxes and insurance. Because a homeowner's monthly payment generally will include amounts for taxes and insurance, the LAA should subtract these amounts from the homeowner's monthly payment before making the calculations.

[159] If the refinancing occurs within a few years after the original loan, the amounts for title insurance, appraisals, and survey costs may be reduced, or even eliminated, depending on the lender's policies and the title insurance company involved.

[160] The up-front costs of refinancing deter some borrowers from refinancing their loans. Nevertheless, if a homeowner has sufficient equity in a home, he or she should be able to finance the refinancing expenses by obtaining a new loan that is large enough to cover not only the amount outstanding on the current loan, but also the refinancing costs. Because most military homeowners sell their properties after a few years, without ever paying off their mortgages, financing these refinancing expenses may be prudent.

[161] A taxpayer's recovery period may be extended because of the reduction in tax deductible interest. The duration of the extension would depend on the taxpayer's tax bracket.

[162] The relatively simple analysis described in this note does not account for the "lost opportunity cost" Captain Jones would incur by using the $3500 for refinancing, rather than investing it profitably. A homeowner who must pay the refinancing costs from separate funds, rather than following the more common practice of adding the refinancing costs to the new loan balance and paying them from the proceeds of the loan, may want to consider these lost opportunity costs.

If Captain Jones has only a year left at his duty station, he could not recover his refinancing costs before his permanent change of station (PCS). Even so, he might decide to refinance if he intends to hold on to the house—either as an investment or for retirement—or if he wants to reduce his monthly payments because he is unsure that he can sell the house before his next PCS. Moreover, if Jones currently holds an adjustable rate mortgage, he might choose to refinance simply to obtain the security of a fixed-rate loan, especially if he believes that rates might rise significantly.

When deciding whether to refinance, a homeowner also may want to consider the tax impact of the refinancing. As a general rule, points paid in connection with the purchase or improvement of a taxpayer's principal residence are deductible if the loan is secured by the residence.[163] Accordingly, when an individual first obtains a home loan to purchase a residence, the points he or she pays generally are deductible in the year in which he or she pays them. Refinancing is a different story. As a general rule, points paid to refinance a home loan are not currently deductible. Instead, the taxpayer must deduct them pro rata over the life of the loan.[164] A taxpayer who uses a portion of the proceeds of the refinancing for home improvements, however, may deduct a portion of the points he or she paid for the refinancing if he or she paid the points out of private funds.[165] In the example described above, if Captain Jones uses $25,000 of the $100,000 loan proceeds for home improvements, he could deduct *twenty-five percent* of the points if he paid them out of separate funds. Accordingly, if Jones intends to use the proceeds in this manner, he should reduce the figure for the cost of refinancing by the tax savings available from that deduction.

With the interest rates now at long-term lows, refinancing may be advantageous to many homeowners, including soldiers. Accordingly, a wise homeowner might spend the time required to shop the mortgage market and undertake the analysis explained above. Lieutenant Colonel Mulliken.[166]

Consumer Protection Points of Contact

Legal assistance attorneys routinely deal with complex consumer problems that affect not only soldiers and their family members, but also the general public. Consumer protection offices can be very helpful in providing legal advice and coordination. An LAA handling a consumer protection issue may want to contact one or more of the following officials. Major Hostetter.

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[163] I.R.C. § 461(g) (1988).

[164] *Id.* § 461(g)(2).

[165] *Id.*

[166] Lieutenant Colonel Mulliken, an individual mobilization augmentee assigned to the Administrative and Civil Law Division, TJAGSA, previously served as the Chief, Legal Assistance Branch, TJAGSA.

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Survivor Benefits Note

The Impact of Medical Retirement on Survivor Benefits

Judge advocates occasionally must advise soldiers facing imminent death about survivor benefits. In an article published in a previous issue of *The Army Lawyer*,[167] Major Thomas Dougall discussed important survivor benefits and the financial impacts of medical retirements on terminally ill or injured soldiers. This note expands on that article.

The government benefits that Major Dougall discussed—specifically, the Survivor Benefit Plan, Dependency and Indemnity Compensation (DIC), Social Security, Dependents' Educational Assistance, and Servicemen's Group Life Insurance (SGLI)—remain effective, although the dollar amounts of some of these benefits have changed since his article's publication in 1990. Monthly DIC payments, for example, have increased by 9.4%[168] and the maximum amount of SGLI has increased to $100,000. Moreover, Congress may enact further significant changes in the near future.[169]

An LAA should consider yet another government benefit when advising a client who is contemplating medical retirement. The surviving family members of a totally disabled, otherwise uninsurable veteran who dies after retiring may be eligible to collect Service Disabled Veteran's Life Insurance (SDVLI).[170] A disabled veteran ordinarily must submit an application for SDVLI coverage to the Department of Veterans' Affairs (VA) within one year of retirement. If the veteran dies within one year of retirement, however, his or her survivors may apply for coverage retroactively. At present, a veteran's maximum coverage under SDVLI is $10,000, but Congress soon may increase this amount to $20,000.[171]

Not all factors weigh in favor of medical retirement. Some private insurance companies that deal extensively with military personnel issue life insurance policies that terminate upon the insured's retirement. An LAA should examine a client's life insurance contract closely when counseling the client about the effects of medical retirement. The LAA also must determine whether the client's retirement will deprive the client of military hospitalization before his or her death. If so, will the client require extensive hospitalization? Is the client's disease or injury "service connected," so that the client may obtain VA hospital care? In a worst-case scenario, a dying patient can linger for weeks or months without hope of recovery. If the veteran spends his or her last days in a private hospital, his or her family may have to absorb significant portions of some very large medical bills.[172] Major Peterson.

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[167] Thomas F. Dougall, *Maximizing Survivor Benefits for Family Members*, ARMY LAW., Jan. 1990, at 12.

[168] *See* TJAGSA Practice Note, *Dependency and Indemnity Compensation Rates*, ARMY LAW., May 1992, at 44; TJAGSA Practice Note, *DIC Rate Increases*, ARMY LAW., June 1991, at 41.

[169] On 11 August 1992, the House of Representatives passed a bill that would create a flat rate for all spousal DIC payments. *See* H.R. 5008, 102d Cong., 2d Sess. (1992). If enacted into law, this bill also would change the payment scheme for children's DIC and would increase the maximum amount of SGLI coverage to $200,000. *See id.*

[170] 38 U.S.C.A. § 1922 (West Supp. 1992).

[171] H.R. 5008, *supra* note 169, § 203.

[172] A detailed analysis of the medical retirement situation appears in Memorandum, Deputy Assistant Judge Advocate General, Dep't of Navy, subject: Retirement of Terminally-Ill Servicemembers (5 Mar. 1991). Legal Assistance attorneys may obtain copies of this memorandum through the Legal Automation Army-Wide System Bulletin Board System (BBS) or the Naval Judge Advocate General Legal BBS (TERMILL.ZIP).

Claims Report

United States Army Claims Service

Personnel Claims Recovery Notes

Proper Dispatch of DD Form 1840R

Periodically, the carrier industry complains to the Claims Service that a claims office has dispatched DD Forms 1840R improperly.[1] A carrier most commonly will complain that it has received multiple DD Forms 1840R with different dates in the same envelope, or that the postmark date on an envelope differs substantially from the date of dispatch indicated on the enclosed form. Obviously, many of these complaints involve notices that are close to the seventy-five-day limit.

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[1] Dep't of Defense, DD Form 1840R, Notice of Loss or Damage (Jan. 1988).

The General Accounting Office (GAO) consistently has upheld the presumption that the date of mailing for a DD Form 1840R is the date of dispatch recorded on the bottom of the form. It repeatedly has refused to address issues such as carrier receipt or differing dates. This presumption is important to the government and to claimants. It preserves the government's right to recover from a carrier by reference to a single entry in the claims file. Consequently, the Claims Service does not have to worry about saving every envelope with a postmark or sending each DD Form 1840R by certified mail to prove delivery.

To avoid needless litigation on this issue, a claims office should mail each DD Form 1840R promptly on the date indicated on the bottom of the form. Moreover, the office should avoid sending multiple DD Forms 1840R with different dates in the same envelopes. Finally, it should establish procedures for receiving and dispatching DD Forms 1840 and periodically should check to ensure that claims personnel are following these procedures. At present, the GAO is deciding the issue of dates of dispatch in our favor. We need to work hard to keep it that way. Colonel Bush.

Recovery on Privately Owned Vehicle Shipment Claims

This Claims Policy Note amends the guidance found in Army Regulation (AR) 27-20,[2] *paragraphs 11-24, 11-33, and 11-35; and in* Department of the Army Pamphlet 27-162,[3] *paragraph 3-21c. In accordance with* AR 27-20, *paragraph 1-9f, this guidance is binding on all Army claims personnel.*

In July 1992, the United States Army Audit Agency (USAAA) issued Report NR 92-700—*Damage Claims for Privately Owned Vehicles Shipped Between CONUS and Europe*. In this report, the USAAA severely criticized the present multiple-contractor system for shipping privately owned vehicles (POVs), noting that because eight or ten separate contractors handle every POV shipped, holding any particular contractor liable for damage to a POV can be extremely difficult. The USAAA strongly advocated adopting a single-contractor POV shipment system. Under a single-contractor system, one contractor would be responsible for moving each POV from origin to destination and would be liable for any damage to the vehicle. To date, however, the Military Traffic Management Command (MTMC) has not accepted this recommendation.

The USAAA also examined current POV recovery procedures in Europe and criticized some aspects of this process. To improve recovery on POV shipment claims under the current multiple-contractor system, the United States Army Claims Service (USARCS), has adopted the following policy changes:

a. *POV shipment claims under $100.* The United States Army Claims Service has directed claims offices and command claims services to close a POV shipment file when the amount paid for damage to the vehicle is less than $100. All POV shipment files involving the loss of items from vehicles will continue to be processed for recovery, regardless of the amounts in question. It has been our experience that these claims almost always involve pilferage occurring during inland transportation; *e.g.*, [theft of] tool boxes, infant seats, seat covers, first aid kits, jacks, jumper cables, and radios. Enforcing restitution in situations involving lost items is the most effective means to motivate the contractor to better police its employees.

b. *POV shipment claims over $2000.* Claims offices will prioritize recovery actions on certain POV shipment claims:

(1) *European offices.* If the amount paid on a POV shipment claim is $2000 or more, European field claims offices will prioritize assembly of the file and will forward it to United States Army Claims Service, Europe, (USACSEUR) on the twenty-first day after payment for recovery action. (To allow the claimant an opportunity to request reconsideration, European field offices should not forward such files sooner than twenty-one days after payment.) The USACSEUR will prioritize action on these files.

(2) *Non-European offices.* If the amount paid on a POV shipment claim is $2000 or more, or if it appears that the POV was dropped or was mishandled severely in shipment, a non-European field claims office will prioritize recovery action on the claim and will attempt to determine whether an outport contractor, stevedore, or inland transporter damaged the vehicle and can be held liable. Claims personnel should contact the outport, obtain the copies of the available documentation—including a copy of the DD Form 788 [4] that accompanied the vehicle—and attempt to establish where the damage occurred.

[2] DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS (28 Feb. 1990) [hereinafter AR 27-20].

[3] DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS (15 Dec. 1989).

[4] Dep't of Defense, DD Form 788, Private Vehicle Shipping Document for Automobile (May 1982); *see also* Dep't of Defense, DD Form 788-1, Private Vehicle Shipping Document for Van (May 1982); Dep't of Defense, DD Form 788-2, Private Vehicle Shipping Document for Motorcycle (May 1982).

(a) If the DD Form 788 that accompanied the POV during shipment or other shipment documentation establishes that an outport contractor, stevedore, or inland transporter damaged the vehicle, the office will assert a demand against the responsible contractor. A contractor's maximum liability on a POV shipment is $20,000 (Item 190, MTMC Freight Traffic Rules Publication 1A).

(b) If the documentation establishes that damage occurred while the POV was in the custody of a European outport, stevedore, or inland shipment contractor, the office will forward the claim to USACSEUR.

(c) If the documentation establishes that the damage occurred while the POV was in the custody of government personnel, the office will annotate the chronology sheet, close the file, and forward it for retirement.

(d) If the documentation suggests that the damage occurred while the vehicle was in the custody of the ocean carrier (the ship) or does not establish where the damage occurred, the office will forward the claim to the Military Sealift Command for assertion against the ocean carrier.

c. *Processing standards for actions by USACSEUR.* The USACSEUR command claims service will review [each] POV shipment file[] forwarded for recovery action against the European inland carrier for potential liability within forty-five days of receipt. If negotiations with a POV contractor result in an impasse, USACSEUR will arrange for dispatch of a contracting officer's final decision within thirty days.

Although these changes will affect only a small number of files, they should improve the rate of successful POV recoveries. Questions about offset actions against POV contractors should be referred to USACSEUR. Mr. Frezza.

Management Note

New Codes for Fiscal Year 1993

The claims accounting codes for fiscal year (FY) 1993 are identical to the FY 1992 codes, except for the fiscal year designator. This digit advances from "2" to "3" to denote the use of FY 1993 funds.

The fiscal year designator is the *third* digit in the *first* group of digits in every claims payment or deposit accounting classification. Advancing this digit from "2" to "3" changes the first group of digits from "2122020" to "2132020." For example, the FY 1993 accounting classification for a personnel claim[5] is as follows:

Payment: 2132020 22-0201 P202099.11-4230 FAJA S99999

Deposit: 2132020 22-0301 P202099.11-4230 FAJA S99999

Every claims office that pays claims, whether electronically or by manual voucher, must ensure that FY 1993 has been entered in the installation accounting system. It may do so by contacting the system administrator at the servicing finance office.

Under no circumstances should a claims office use an FY 1992 fund cite for claims certified for payment after the beginning of FY 1993 (1 October 1992). To determine if the servicing finance office is using the correct fiscal code, the claims office should review the accounting classification found on the bottom of the claims office's copy of a finance-generated payment voucher—that is, the pink copy of the payment voucher that the finance office sends to the claims office. A claim certified for payment with FY 1993 funds must begin with "2132020" for the payment to be effective. Major Lazarek.

[5] *See generally* AR 27-20, *supra* note 2, ch. 11.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office and
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Equal Employment Opportunity Notes

Equal Employment Opportunity Commission Remands

The Equal Employment Opportunity Compliance and Complaints Review Agency (EEOCCRA) recently directed equal employment opportunity (EEO) officers to ensure that agencies comply promptly with remand orders issued by the Equal Employment Opportunity Commission (EEOC). In a remand order, the EEOC returns a complaint to an agency for action, generally allowing the agency only limited time in

which to carry out the order. What an agency must do to comply with a remand order varies from case to case. An order may require an agency to execute a proposed disposition. Alternatively, it may direct the agency to issue a final agency decision, or to request a hearing before the EEOC. After issuing a remand order, the EEOC tracks the agency's performance by computer. It also follows up remand orders by consulting with the EEOCCRA at least once each month.

Many agencies fail to respond promptly to EEOC remand orders. The Army's own record is not spotless. The EEOC's Office of Federal Operations (OFO) recently cited the Army for noncompliance in a number of remand cases. Moreover, in May 1992, EEOC Chairman Evan Kemp wrote to the Secretary of the Army, complaining of eight cases in which Army activities had failed to comply with remand orders. An analysis of these cases revealed the following:

Army activities take too long to comply with EEOC remand orders. The noncompliance incidents of which Chairman Kemp complained stemmed from remand decisions that the EEOC issued between December 1990 and August 1991. The EEOCCRA has emphasized repeatedly that an activity must give compliance letters top priority and must notify the EEOCCRA if problems or delays arise.

In several instances, Army activities actually carried out remand orders, but failed to notify the EEOC Compliance Office or the EEOCCRA that they had done so. Consequently, the EEOC assumed that the activities had disregarded the orders entirely. The outcomes of these cases show clearly that an EEO officer or a labor counselor assigned to an activity must report the activity's interim or partial compliance with a remand order to the EEOC in a timely manner.

In some cases, Army activities apparently abandoned any attempts at compliance after they encountered problems in executing remand orders. Not knowing what to do, command representatives simply suspended their efforts, rather than seeking further guidance from the EEOCCRA.

The lag time involved in requesting, scheduling, and completing United States Army Civilian Appellate Review Agency (USACARA) investigations delayed the Army's compliance with remand orders. The failure of the EEOC to identify cases clearly as remands also delayed the processing of the cases. Command representatives probably would have resolved the cases more quickly, had they realized that the cases were remands.

Two other areas of concern involve complaints that are accepted when they should have been rejected and complaints that are rejected when they should have been accepted. A field activity has no way of tracking improper acceptances, which typically consist of untimely complaints and complaints based on issues for which Title VII[1] offers no redress. Eventually, an activity will dismiss these complaints, often after expending considerable effort and money to process them. Improper rejections may be tracked more easily. The number of remands is growing, reflecting an increasing number of incorrect initial or final actions by field activities. The following table shows the number of EEOC remands, and the percentage of agency actions resulting in EEOC remands, over the past six years:

Fiscal Year	Remands
1992 (until August)	42 (44%)
1991	72 (49%)
1990	47 (38%)
1989	31 (30%)
1988	35 (16%)
1987	18 (22%)

Unfortunately, these statistics do not reflect cases that were accepted erroneously. Nevertheless, the table reveals that labor counselors and EEO officers must scrutinize acceptances, rejections, and cancellations much more carefully than they have in the past.

Currently, the EEOC sends remand decisions and orders to the EEOCCRA, which then faxes each decision to the appropriate activity. The activity must determine whether to ask the EEOC to reopen the decision. If the activity requests a reopening, the EEOCCRA must decide whether the request meets reopening criteria. Unless the request meets this standard, the EEOCCRA will not forward it to the EEOC.

Until recently, if the activity presented no request to reopen, the EEOCCRA would prepare an implementation letter no later than thirty days after it received the EEOC decision. An implementation letter repeats verbatim the EEOC order to which it pertains. It also specifies when the activity must complete particular actions and to whom the activity must submit interim and final compliance reports.

Effective 10 August 1992, the EEOCCRA modified this procedure to expedite actions on remand. The EEOCCRA now will fax a packet to the activity within five work days after the EEOC issues a remand decision. The packet will include the EEOC decision, a summary of the procedures for requesting reopenings, and an implementation letter. The new procedure permits an activity to implement a remand order immediately, instead of waiting for further directives from the EEOCCRA, if the activity decides not to request a reopening.

A labor counselor should pay special attention to reopening criteria to ensure that the government wastes no time by drafting futile requests to reopen. Activities presently seek to reopen approximately half of the EEOC's remand decisions. The EEOCCRA, however, forwards only about seventeen percent of those cases to the EEOC and the OFO actually grants less than five percent of the government's requests for reopening and relief.

[1] Civil Rights Act of 1964, Pub. L. No. 88-352 §§ 701-716, 78 Stat. 287, 302-17 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-16 (1988)).

The EEOC's criteria for reopening its decisions are very strict. It will reopen a decision only if: (1) Either party has acquired new and material evidence that was not readily available when the EEOC issued the previous decision; (2) in reaching the previous decision, the EEOC misinterpreted a law or regulation, or misapplied established policy; or (3) the decision is so exceptional that its effect extends beyond the case at issue.

To ensure that activities submit only appropriate reopening requests, the EEOCCRA has agreed to send copies of remand letters to the Labor and Employment Law Office (LELO), Office of The Judge Advocate General. The LELO then will coordinate with installation labor counselors, either telephonically or through the Legal Automation Army-Wide System Bulletin Board System, to ensure that reopening requests meet the governing criteria. The LELO also will publish practice notes in *The Army Lawyer* and the *EEOCCRA Bulletin* about requests to reopen, criteria for review, and relevant EEOC decisions.

The EEOCCRA has determined that easy identification of remand cases is crucial to timely compliance. Accordingly, the EEOCCRA has begun to identify all remand cases with the prefix "RE." Equal employment opportunity offices should preface docket numbers with this code in all correspondence generated in response to remand decisions. Using this prefix will alert all personnel involved that the complaint is a remand and that it requires special handling. The code also will help the EEOCCRA to track the remand. Labor counselors should watch for this code when they review complaints and should assure that all remand actions are coded properly.

At the request of the EEOCCRA, the USACARA has agreed to assign top priority to investigations triggered by remands. An activity should forward a remanded case to the USACARA only if an investigation actually is needed. When an activity must request an investigation, it should do so at the earliest feasible date to give the USACARA as much advance notice as possible. The USACARA has asked activities to send it advance notices by fax whenever possible; the USACARA fax number is (703) 756-1425.

An activity also should keep the EEOC compliance officer and the EEOCCRA informed of the status of each of its actions on remand. The points of contact in the EEOCCRA, Ms. Dianne Rogers and Mrs. Chrystal Rivera, may be reached at (703) 607-1450 or at DSN 327-1436 or 1437. If an activity neglects to comply with the terms of a remand order within the time limit established in that order, the EEOCCRA will notify the activity of this deficiency in a letter addressed personally to the activity commander.

Activity and command labor counselors must coordinate closely with their EEO officers and should involve themselves in the process by which EEO complaints are accepted, rejected, and cancelled. A civilian personnel officer also should be involved in every remand case.

Sixth Circuit Reinstates Civil Action Based on a "Continuing Violation" Theory

In a case of first impression, the Court of Appeals for the Sixth Circuit reviewed the requirements for successfully alleging the existence of a continuing violation in a discrimination action.[2] A court ordinarily will dismiss a discrimination claim as untimely unless the defendant's alleged misconduct occurred within a prescribed limitations period. Under the continuing violation theory, however, a plaintiff may challenge "an ongoing, continuous series of discriminatory acts . . . in their entirety as long as one of those discriminatory acts falls within the limitations period."[3]

In reversing the district court's dismissal of the complaint in the instant case, the Sixth Circuit held that a plaintiff need not invoke the continuing violation theory expressly during an agency's administrative disposition of the complaint to preserve a civil cause of action.[4] The court found that a civil cause of action shall survive if the continuing violation theory is evident from the charges the plaintiff originally filed under the EEOC regulations.[5]

Labor Relations Notes

Release of Home Addresses—The Saga Continues

The Court of Appeals for the Third Circuit, sitting en banc, recently ruled that an agency must provide the home addresses of bargaining unit members to the union representing those employees.[6] As previously reported in *The Army Lawyer*,[7] the circuits are split on this issue. With this decision, the Third Circuit joins the Fourth and Ninth Circuits in holding that home addresses must be released to unions.[8] The First, Second,

[2] Haithcock v. Frank, 958 F.2d 671 (6th Cir. 1992).

[3] *Id.* at 677 (citing Held v. Gulf Oil Co., 684 F.2d 427, 430 (6th Cir. 1982)).

[4] *Id.*

[5] *Id.*

[6] Federal Labor Relations Auth. v. Department of the Navy, 966 F.2d 747 (3d Cir. 1992) (en banc).

[7] *See* Labor Relations Note, *Home Addresses Revisited—Again*, ARMY LAW., July 1992, at 43.

[8] *See generally* Federal Labor Relations Auth. v. Department of the Navy, 958 F.2d 1490 (9th Cir. 1992); Department of Health & Human Servs. v. Federal Labor Relations Auth., 833 F.2d 1129 (4th Cir. 1987), *cert. dismissed*, 488 U.S. 880 (1988).

and District of Columbia Circuits, however, have refused to compel agencies to release addresses.[9] Given the split between the circuits, labor counselors should review requests for release of home addresses carefully and should notify Department of the Army officials if a union requests the release of home addresses of employees working on an installation located within the Third, Fourth, or Ninth Circuits.

District of Columbia Circuit Rejects Federal Labor Relations Authority's "Clear and Unmistakable Waiver" Doctrine

For the second time in as many months, the Court of Appeals for the District of Columbia has castigated the Federal Labor Relations Authority (FLRA).[10] The appellate court vacated and remanded the FLRA's decision in *National Treasury Employees Union*.[11] In that 1991 decision, the FLRA stated that a union has a statutory right to designate its own representative.[12] Unless the union clearly and unmistakably waives this right in a negotiated agreement, an agency that refuses to recognize the union's designated representative commits an unfair labor practice (ULP).[13]

The appellate court held that the FLRA applied the wrong standard. Overruling the FLRA decision, it held that the proper resolution of a ULP complaint depends on an interpretation of the negotiated agreement, not on whether the union "clearly and unmistakably waived" the statutory right in the agreement.[14]

Civilian Personnel Law Note

Merit Systems Protection Board Upholds Removal as an Appropriate Penalty for Falsifying an Employment Document

The Merit Systems Protection Board (MSPB) recently upheld an agency's removal of an employee for falsifying an initial employment document.[15] When completing a questionnaire, the appellant, a GS-12 contract specialist, lied to conceal that he once had been arrested.[16] He lied about his prior arrest again during several oral interviews. The MSPB decision affirmed the employee's removal, overturning an initial decision in which the administrative judge had mitigated the removal to a thirty-day suspension.[17] The MSPB specifically found that the seriousness of the offense justified removal.[18]

Share This Information with the Rest of the Team

Be sure to pass these Labor and Employment Law Notes to the rest of the labor-management team. Share this information with your civilian personnel officer and your EEO officer.

[9] *See* Federal Labor Relations Auth. v. Department of Veterans' Affairs, 958 F.2d 503 (2d Cir. 1992); Federal Labor Relations Auth. v. Department of the Navy, 941 F.2d 49 (1st Cir. 1991); Reed v. National Labor Relations Bd., 927 F.2d 1249 (D.C. Cir. 1991), *cert. denied* 112 S. Ct. 912 (1992). *See generally* Labor Relations Note, *supra* note 7, at 43.

[10] Internal Revenue Serv. v. Federal Labor Relations Auth., 963 F.2d 429 (D.C. Cir. 1992); *see also* Labor Relations Note, *District of Columbia Court of Appeals Holds that Two Federal Labor Relations Authority Decisions Lack "Any Coherent or Rational Explanation"*, ARMY LAW., July 1992, at 43 (discussing Marine Corps Logistics Base, Albany, Ga. v. Federal Labor Relations Auth., 962 F.2d 48 (D.C. Cir. 1992).

[11] 39 F.L.R.A. 1568 (1991), *vacated and remanded sub nom.* Internal Revenue Serv. v. Federal Labor Relations Auth., 963 F.2d 429 (D.C. Cir. 1992).

[12] *Id.* at 1574.

[13] *Id.* The FLRA adopted the "clear and unmistakable waiver" test to prevent unions from suffering unfair penalties for electing to pursue complaints under ULP procedures. *See id.* at 1573 (noting that 5 U.S.C. § 7116(d) (1988) precludes a party from filing a grievance once the party elects to pursue the matter through ULP procedures).

[14] Internal Revenue Serv. v. Federal Labor Relations Auth., 963 F.2d at 433.

[15] Williams v. Executive Office of the President, 54 M.S.P.R. 196 (1992).

[16] *See* General Serv. Admin., Standard Form 86, Questionnaire for Sensitive Positions (Dec. 1990).

[17] *Williams*, 54 M.S.P.R. at 197.

[18] *Id.* at 200.

Procurement Fraud Division Note

Procurement Fraud Division, OTJAG

Recent Developments

Restructuring of Army Procurement Fraud Advisor Training Begins 30 November 1992

Since 1987, instructors at The Judge Advocate General's School (TJAGSA), assisted by personnel from the Procurement Fraud Division (PFD), Office of The Judge Advocate General (OTJAG), have presented an annual Procurement Fraud Advisor's Course. The training that military attorneys have received in this course undoubtedly has contributed to the successes of the Army's procurement fraud and coordination of remedies programs. Nevertheless, a review of the comments of students, instructors, and senior judge advocates

revealed that PFAs could be trained more effectively if the existing program of instruction were divided into two separate phases. Accordingly, the Procurement Fraud Advisor's Course has been replaced with following two new classes: the Basic Procurement Fraud Course and the Advanced Procurement Fraud Workshop.

The Judge Advocate General's School will offer the Basic Procurement Fraud Course annually. This two-day course will provide students with fourteen hours of basic instruction on the legal and practical aspects of advising installation-level contracting personnel and investigators about contract fraud issues and referring fraud cases to appropriate agencies. Instructors from TJAGSA will teach a variety of topics, including coordination of remedies; indicators of fraud; criminal investigations; product substitution; cost principles; defective pricing; contract, civil, and administrative remedies; and actions against government employees. The course will be open to active duty and Reserve Component judge advocates, and to civilian attorneys employed by the federal government who have been detailed as PFAs or procurement fraud and irregularities coordinators, or who are expected to serve in either capacity in the future. All newly assigned PFAs should attend this course.

The 1st Basic Procurement Fraud Course (5F-F36) will be held at TJAGSA from 30 November to 1 December 1992. Staff judge advocates and command counsel may obtain quotas for this course only through the Army Training Requirements and Resources System (ATRRS). The procedures for obtaining a quota are described in this issue of *The Army Lawyer* in *CLE News*, *infra* page 62. Should you have any problems or questions about ATRRS, please contact the TJAGSA point of contact, Mrs. Hazel Oldaker, at (804) 972-6307.

The Advanced Procurement Fraud Workshop is a three-and-one-half-day workshop that the PFD will offer on an eighteen-month cycle. The workshop will cover advanced topics, such as working with criminal investigators; persuading local United States attorneys or the Department of Justice to act on procurement fraud cases; emerging areas of fraud; and recent developments in civil, contractual, and administrative remedies. It also will include hands-on training on procurement fraud problems and seminars on procurement fraud issues that are unique to major commands.

The PFD probably will conduct its first advanced workshop in Arlington, Virginia, during the week of 18 May 1993. The advanced workshop will be open to anyone serving as a PFA or performing a related mission. The PFD point of contact for this workshop is Ms. Christine McCommas. She can be reached at (703) 696-1550, FAX (703) 696-1559. Please contact her if you have any questions regarding the new structure of the PFA Training Program or if you have any ideas you would like to see incorporated into the advanced workshop. Lieutenant Colonel Rothlein.

The Effect of Suspension and Debarment on a Contractor's Ability to Obtain Export Licenses and Security Clearances

Most contractors are sensitive to the harm their reputations may sustain if they are suspended or debarred. They understand that their competitors may use suspensions or debarments to discredit them. Suspension and debarment, however, have many ramifications that a contractor may not understand until it actually faces them. Two lesser known consequences of these actions involve export licenses and security clearances.

Any contractor that wishes to export goods mentioned on the United States Munitions List must obtain an export license from the State Department. The State Department will deny a contractor's application for a license if the applicant has been suspended or debarred. If the suspending or debarring agency has acted against a division of a company, rather than the entire company, only the offending division will be affected.

The State Department may learn of an applicant's suspension or debarment from several sources. A contractor whose business requires an export license must inform the State Department within five days of being notified that it has been suspended or debarred. Moreover, the State Department's Office of Defense Trade Controls (ODTC) electronically reviews the General Services Administration (GSA) lists of parties excluded from federal procurement or nonprocurement programs each day. By reporting new additions as they appear on the lists, the ODTC prevents the issuance of export licenses to suspended and debarred contractors.

Without an export license, a company may not export goods mentioned on the United States Munitions List, even if it already has contracted to do so. Accordingly, a suspension or debarment may curtail an exporter's income severely, even if the exporter rarely contracts with the United States.

Suspension or debarment also has a traumatic effect on a contractor's eligibility to work on classified projects. The Defense Investigative Service (DIS) receives copies of all suspension and debarment letters. The DIS immediately will invalidate a site clearance held by a suspended or debarred contractor. If only a division of a company is listed, only the offending division will be affected. When the DIS revokes a contractor's site clearance, the contractor must cease work on any government contract that requires a security clearance. It may resume work on the contract only with the express approval of the contracting officer.

Army lawyers serving as procurement fraud advisors are uniquely situated to inform contract personnel of the limitations the ODTC and DIS can place on contractors. When an errant contractor is involved with substantial overseas or classified contracts, an ODTC or DIS action can be a forceful admonition. Major Wittman.

Military Traffic Management Command Regulation for Disqualifying Transportation Carriers

The Military Traffic Management Command (MTMC), the military traffic and land transportation manager for the Department of Defense (DOD), procures transportation services for every DOD component. One directive governing MTMC operations should be particularly interesting to Army procurement fraud lawyers. *Military Traffic Management Command Regulation 15-1*[1] allows MTMC temporarily to prohibit a carrier from transporting freight, personal property, or passengers for the DOD, either by disqualifying the carrier or by placing the carrier in a nonuse status. Both actions protect the government temporarily from a carrier who fails to comply with applicable laws, rules, regulations, or contract terms.

The regulation predicates disqualification on a carrier's failure to perform in accordance with the terms of a procurement.[2] The procurement in question may be consummated through formal contracting procedures under the *Federal Acquisition Regulations* or through the use of a government bill of lading.[3] One example of unsatisfactory performance that would justify a disqualification action is a carrier's failure to provide exclusive use services in breach of the parties' express agreement that these services would be provided.

The Eastern or Western Area Commander, MTMC, may disqualify a carrier for not more than 180 days.[4] The Commander, MTMC, normally may not disqualify a carrier for more than two years.[5] A carrier may be disqualified from specific routes or types of shipments, or from all routes and all shipments.[6]

Nonuse is predicated on a deficiency in the carrier's qualification to participate in the appropriate transportation program.[7] Typical deficiencies include using unsafe equipment and failure to maintain required insurance, bonding, or licenses.[8] A carrier typically will be placed in nonuse until it has corrected its deficiency.[9] Additionally, a carrier may be placed in immediate nonuse for not more than thirty days pending a board hearing if exigent circumstances indicate a need for immediate government protection.[10]

The procedural due process requirements for a disqualification or nonuse action resemble the procedural requirements for a suspension or a debarment.[11] Supporting documentation may be obtained from transportation specialists at the movement's origin or destination, MTMC surveillance teams, special agents of the affected service, or affected citizens. This information is disseminated to the appropriate area command or to Headquarters, MTMC, with a recommendation for board action.[12] If appropriate, a review board will be convened to determine the need for protective action.[13] The command will provide the carrier with written notice of the intent to convene a board and the allegations that the board will consider.[14] The carrier is entitled to respond to the allegations,[15] to appeal an unfavorable board decision,[16] and to be represented by retained counsel.

Depending on the operating directorate involved, the board may be designated as a passenger review board or an area command review board. A legal advisor may attend as a nonvoting member of the board.[17] The legal advisor must ensure that any board decision to disqualify a carrier, or to place it in

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[1] MILITARY TRAFFIC MANAGEMENT COMMAND, REG. 15-1, BOARDS, COMMITTEES, AND COMMISSIONS: PROCEDURE FOR DISQUALIFYING AND PLACING CARRIERS IN NONUSE (12 Dec. 1984).

[2] *Id.* para. 5*a*.

[3] *See id.*

[4] *Id.* para. 3*a*.

[5] *See id.*

[6] *Id.*

[7] *Id.* paras. 3*c*, 5*b*.

[8] *Id.* para. 5*b*.

[9] *Id.* para. 3*c*.

[10] *Id.* para. 6*b*.

[11] *See generally id.* para. 6.

[12] *Id.* para. 6*a*.

[13] *Id.*

[14] *See id.* para. 6*a*(1).

[15] *See id.* para. 6*a*(2). A carrier may respond "in writing, in person, or by telephone conference." *See id.*

[16] *See id.* para. 10.

[17] *See generally id.* para. 7*a*.

nonuse, is supported by substantial evidence. Minutes of every board hearing must be recorded and these records must be maintained for three years after the board meets.[18]

After considering the evidence, the board may vote to take no action, to place the carrier in nonuse, or to disqualify the carrier. If the board disqualifies a carrier, it may suspend all or part of the disqualification.[19] If a carrier's unsatisfactory performance recurs during the period of suspended disqualification, MTMC may vacate the suspension and impose the original disqualification without convening a hearing.[20] Alternatively, it may initiate a separate review board action to consider the new violation.[21] If it does so, it must afford the carrier the procedural rights described above. A disqualification action by MTMC does not prohibit the Army from taking a separate suspension or debarment action.

Additional information about disqualification and nonuse actions may be obtained from the following contacts: Mr. Ramon Morales, Headquarters, MTMC, at DSN 289-1580 or (703) 756-1580; Mr. Richard Blakely, MTMC Western Area Headquarters, at DSN 859-2921 or (510) 466-2921; Captain Larry Brady, MTMC Eastern Area Headquarters, at DSN 247-7122 or (201) 823-7122; or Mrs. Christy Kern, PFD, OTJAG, at DSN 229-1550 or (703) 696-1550. Mrs. Kern.

A New Spin on Surety Fraud—Failure to Disclose Bond Obligations

The terms of a solicitation for federal procurement may require a bidder to provide a guarantee with its bid. This bid guarantee—typically a bond signed by a surety—assures the government that the bidder will not withdraw its bid within the period specified for acceptance. It also helps to ensure that the bidder will execute a written contract and furnish the requisite performance and payment bonds.

The surety on a bid guarantee may be a corporation or an individual. An individual, however, may be excluded from acting as a surety on a government contract for failure to disclose his or her bond obligations.[22] An individual surety excluded on this basis is placed on the GSA lists of parties excluded from procurement and nonprocurement programs and, therefore, cannot be awarded a government contract.[23]

In a case of first impression, the Army recently proposed two individuals for debarment for failure to disclose bond obligations. On 6 April 1990, Mr. Jim Brown and Mr. Robert Holloway signed a bid bond on behalf of a government contractor who had bid on a contract to replace floor tiles in several buildings at Fort Campbell, Kentucky. Four days later, the same two individuals signed bonds on behalf of a contractor on a different project, falsely stating that they were not sureties on any other bond. The Fort Campbell contracting officials noticed the misrepresentation and reported it to the PFD.

By overstating assets, understating liabilities, or failing to disclose other bond obligations, a dishonest bid surety can expose the government to a significant risk of loss. Contracting officials and PFAs should watch for similar surety fraud schemes and should report them promptly to the PFD. Major Chapman.

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[18] *Id.* para. 7*c*.

[19] *Id.* para 7*d*(5).

[20] *Id.*

[21] *Id.*

[22] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 28.203-7(b)(2) (Apr. 1, 1984).

[23] *Id.* at 28.203-7(c), (e).

Criminal Law Division Notes

Criminal Law Division, OTJAG

Ordering Reservists to Active Duty for Disciplinary Proceedings

Over the past two years, the Criminal Law Division, Office of The Judge Advocate General (OTJAG), has received eight requests to order Reserve and National Guard soldiers to active duty for courts-martial. The infrequency of these requests suggests that commanders and judge advocates believe that activation actions should be reserved for egregious cases. The purpose of this note is to dispel this perception.

Article 2(d) of the Uniform Code of Military Justice (UCMJ) empowers active duty general courts-martial convening authorities to order Reserve or National Guard per-

sonnel to active duty. This authority is not subject to serious challenge.[1]

Reports of criminal misconduct arising after Operations Desert Shield and Desert Storm provoked a recent increase in Reserve Component activations. Four of the eight Reserve and National Guard soldiers for whom activation orders were requested were charged with committing offenses while serving in Title 10 status during their deployments to Southwest Asia.

The eight requests came from Fort Sheridan, Fort Leonard Wood, Fort Lewis, and Fort Drum. Each request to approve orders calling a soldier to active duty for disciplinary purposes has been approved, or presently is being processed for approval. The eight soldiers involved have been accused of committing a variety of offenses—among them, larceny of a M16A1 rifle and a Kevlar vest, assault upon a superior commissioned officer, assault upon a trainee, using abusive language toward trainees while serving as a training noncommissioned officer (NCO), travel fraud (committed by submitting a false official travel claim), larceny of government property, and unlawfully importing captured Iraqi weapons and ordnance.

The relatively simple procedure for requesting approval is set forth in *Army Regulation (AR) 27-10*.[2] Under this procedure, an active duty general court-martial convening authority may order a Reservist or member of the National Guard to involuntary active duty to appear before an investigation pursuant to UCMJ article 32, to be tried by court-martial, or to undergo nonjudicial punishment proceedings pursuant to UCMJ article 15. The process rises to the level of the Department of the Army only if the soldier might be confined after activation. When a convening authority wishes to impose pretrial confinement, or to allow a court-martial to impose confinement as a sentence, he or she must submit the proposed activation order through the Criminal Law Division, OTJAG, to the Assistant Secretary for Manpower and Reserve Affairs.[3]

An activation request should consist of the following documents:

- A request for secretarial approval of the order calling the soldier to involuntary active duty.
- A copy of the activation order.[4]
- A copy of the charge sheet.
- A copy of the report of investigation or a summary of the evidence supporting the charges.

In drafting activation requests, judge advocates may wish to use the following sample request as a guide:

> MEMORANDUM FOR Headquarters, Department of the Army, Office of The Judge Advocate General, ATTN: DAJA-CL, Washington, D.C. 20310-2200
>
> SUBJECT: Request for Secretary of the Army Approval of Order to Involuntary Active Duty
>
> 1. Purpose. To obtain Secretary of the Army approval of the order to involuntary active duty of SPC Will Tu Steel, 000-00-0000, Headquarters and Headquarters Company, 123d Transportation Battalion, 1123 Campbell Drive, Woodville, Oregon, for the purposes of an investigation pursuant to article 32, Uniform Code of Military Justice (UCMJ), and possible trial by court-martial.
>
> 2. Discussion.
>
> a. The charges in this case involve violations of UCMJ articles 121 and 108—respectively, larceny and loss of government property. SPC Steel wrongfully took a M16A1 rifle from the unit arms room and transported it to his residence. When he heard through a friend that the weapon had been reported missing and the unit was initiating a recall of personnel, he threw the rifle into the Willamette River. The rifle never was recovered. These offenses occurred while SPC Steel was performing annual training at Camp Rilea, Oregon.
>
> b. The charges were preferred on 10 January 1992. The unit commander forwarded the charges to this command and recommended trial by general court-martial. Copies of the charge sheet and the commander's memorandum are enclosed.

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[1] Murphy v. Garret, 29 M.J. 469 (C.M.A. 1990); Robert E. Reed & Daniel G. Jarlenski, *Procedures and Issues Relating to the Courts-Martial of Reservists*, 32 A.F. L. REV. 331 (1990); TJAGSA Practice Note, *The United States Court of Military Appeals Addresses the Reserve Jurisdiction Act*, ARMY LAW., May 1990, at 60.

[2] DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 21-3 (22 Dec. 1989) [hereinafter AR 27-10].

[3] *Id.* para. 21-3*b*. The Secretary of the Army has delegated the authority to approve involuntary activations for disciplinary action involving deprivation of liberty to the Assistant Secretary of the Army for Manpower and Reserve Affairs.

[4] The authority line for an activation order should cite 10 U.S.C. § 802(d) (1988). Telephone Interview with Sergeant Major Jack Pendleton, Headquarters, U.S. Army Personnel Command (22 May 1992).

c. In accordance with UCMJ article 2(d) and Army Regulation 27-10, paragraph 21-3, SPC Steel was ordered to involuntary active duty by the general court-martial convening authority, the Commanding General, XL Corps, on 15 January 1992 for an investigation pursuant to UCMJ article 32 and possible trial by court-martial. A copy of the order is enclosed.

d. SPC Steel currently resides at 934 Parkson Avenue, Beaverton, Oregon 97000.

e. POC is CPT Lena Sharp, Office of the Staff Judge Advocate, XL Corps, Fort Canby, Washington 98000. Her telephone number is DSN XXX-XXXX/XXXX.

3. Recommendation. That the Secretary of the Army approve the order to involuntary active duty of SPC Will Tu Steel.

The example provided above should serve only as a guide. It does not represent a required format.

The Army Reserve and the Army National Guard comprise over half of the Army's total deployable forces. Maintaining Reserve Component unit readiness for early deployments will remain a priority.[5] Enforcing the same disciplinary standards for all soldiers, active duty and Reserve, will enhance unit morale and efficiency. The activation procedures set forth in *AR 27-10* should ensure that commanders never hesitate to bring a suspected offender to justice merely because the request for orders activating the suspect must go to the Department of the Army for approval.[6] The interests of justice, the need to maintain good order and discipline, and the availability of resources to try the case should guide a convening authority's decision. Lieutenant Colonel Foote.

Public Hearings for Nonjudicial Punishment

Introduction

The Criminal Law Division, OTJAG, recently was asked whether a commander rightfully may conduct a public hearing when administering nonjudicial punishment pursuant to UCMJ article 15.[7] The inquiry focused on whether the imposing commander may require soldiers assigned to the commander's unit to attend article 15 hearings. These procedures were being considered as a method of deterring soldiers from engaging in misconduct.

This note addresses the benefits of, and potential problems associated with, conducting nonjudicial punishment publicly. Before evaluating the wisdom of such a hearing, however, one should consider its legality.

The Legality of Public Hearings

Neither the *Manual for Courts-Martial*,[8] nor the applicable Army regulation,[9] expressly discusses the type of public hearing mentioned in the inquiry we received. Nevertheless, both sources clearly permit commanders to conduct such hearings. The *Manual for Courts-Martial* provides, in pertinent part, that

> (1) . . . Before nonjudicial punishment may be imposed, the servicemember shall be entitled to appear personally before the . . . authority who offered nonjudicial punishment, except when appearance is prevented by the unavailability of the nonjudicial punishment authority or by extraordinary circumstances, in which case the servicemember shall be entitled to appear before a person designated by the nonjudicial punishment authority . . . . If the servicemember requests personal appearance, the servicemember shall be entitled to:
>
> . . . .
>
> (G) Have the proceeding open to the public unless the nonjudicial punishment authority determines that the proceeding should be closed for good cause . . . or unless the punishment to be imposed will not exceed extra duty for 14 days, restriction for 14 days, and an oral reprimand . . . .[10]

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[5] U.S. ARMY WAR COLLEGE, ARMY COMMAND AND MANAGEMENT: THEORY AND PRACTICE, 1990-1991, at 13-14 to 13-17 (1990).

[6] Funding also may be a significant pragmatic issue for the convening authority to resolve. *Army Regulation 27-10* presently provides, "Costs associated with disciplining [Reserve Component (RC)] soldiers will be paid out of RC funds." *See* AR 27-10, *supra* note 2, para. 21-2*d*. This provision has been criticized as unfairly placing the entire financial burden on the Reserve Component. The following revision, which has been staffed for comment, would shift the cost to the component initiating the action:

> Costs associated with disciplining RC soldiers per paragraph 21-3 (below) will be borne by the component initiating the UCMJ action. An order to involuntary active duty will cite Reserve Personnel, Army, (RPA) funds or National Guard, Army, (NGPA) funds when the activation is initiated by an RC commander. Military Personnel, Army, (MPA) appropriations will be cited when the action is initiated by an Active Army commander.

[7] UCMJ art. 15 (1988).

[8] MANUAL FOR COURTS-MARTIAL, United States (1984) [hereinafter MCM].

[9] *See generally* AR 27-10, *supra* note 2.

[10] MCM, *supra* note 8, pt. V, ¶ 4c(1)(G).

The *Manual for Courts-Martial* also provides that, subject to the approval of the nonjudicial punishment authority, a service member may decline to appear personally at his or her article 15 hearing.[11] A service member, however, has "no absolute right to refuse to appear personally before the person administering the nonjudicial punishment proceeding."[12] By implication, the service member also has no absolute right to refuse the entitlements associated with personal appearance, including an open hearing.[13]

Army Regulation 27-10 expressly recognizes that the nonjudicial punishment authority can conduct a hearing publicly, despite the service member's request to the contrary. Paragraph 3-18 of *AR 27-10* provides, in pertinent part, "Ordinarily, [article 15] hearings are open. However, a soldier may request an open or closed hearing. In all cases, the imposing commander will, after considering all the facts and circumstances, determine whether the hearing will be open or closed."[14]

Of course, the nonjudicial punishment authority may not deny a request for a closed hearing arbitrarily. Nevertheless, neither the *Manual for Courts-Martial*, nor *AR 27-10*, specify whether "good cause,"[15] or some lesser standard, applies to the denial of such a request. Regardless of the standard employed, the deterrent effect or other benefits that ostensibly would derive from a public hearing could constitute sufficient bases for denying a soldier's request for a closed hearing. On the other hand, the commander's desire to enhance deterrence or to achieve other benefits does not obviate the need for a *case-specific* determination whether to grant a soldier's request that the nonjudicial punishment hearing be closed.

An "open hearing," as used in connection with nonjudicial punishment proceedings, need not be held before a mass audience. *Army Regulation 27-10* explains that "an open hearing is a hearing open to the public but does not require the commander to hold the proceeding in a location different from that in which the commander conducts normal business, *i.e.*, the commander's office."[16] Often, an open hearing will involve the attendance of no more than a few individuals, in addition to the persons actually participating in the hearing. Indeed, the few nonparticipants sometimes will be present at the request of the soldier who has been offered nonjudicial punishment.

In summary, the open hearings contemplated in the inquiries are permitted. They may be conducted even over the objection of the accused. A commander, however, should consider each case carefully to determine the wisdom of conducting the proceedings publicly.

Benefits of Public Hearings

Wise use of public hearings for nonjudicial punishment can help a commander to achieve several interrelated goals. Among the most important of these are increasing the respect soldiers feel for their leaders, demonstrating the fairness and effectiveness of the military disciplinary system, and enhancing deterrence.

Ignorance breeds mistrust. This truism is especially pertinent when applied to a soldier's perceptions of his or her leader's enforcement of military discipline. When soldiers learn of the imposition of nonjudicial punishment within their unit primarily through the account of the soldier receiving the punishment, the perceived fairness of the punishment, and of the commander who imposed it, often will suffer. On the other hand, a commander can earn the respect of his or her subordinates if he or she openly conducts fair disciplinary proceedings, reaches supportable findings, and imposes just punishments. Similarly, first-hand knowledge that a unit's disciplinary system is just enhances soldiers' respect for that system. Soldiers respond better to discipline that they believe to be administered fairly.

With enhanced discipline comes enhanced deterrence. Seeing their commander address a comrade's misconduct expeditiously and appropriately by imposing nonjudicial punishment probably will discourage soldiers from engaging in misconduct. Accordingly, public hearings can serve the legitimate goal of general deterrence, even as they specifically deter and rehabilitate the soldiers being disciplined.

Potential Risks of Public Hearings

As with any discretionary activity, the use of public hearings for nonjudicial punishment is subject to abuse. Moreover, even the most well-intentioned commanders must evaluate the

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[11] *Id.* pt. V, ¶ 4c(2).

[12] *Id.* pt. V, ¶ 4 analysis, app. 21, at A21-106.

[13] The soldier also is entitled to receive a rights warning statement in accordance with UCMJ article 31(b); to be accompanied by a spokesperson; to be informed of the pertinent information against the soldier; to examine the evidence that the nonjudicial punishment authority intends to consider; to present matters in defense, extenuation, and mitigation; and to present reasonably available witnesses. *Id.*, pt. V, ¶ 4c(1) (A)-(F).

[14] AR 27-10, *supra* note 2, para. 3-18*g*(2).

[15] *Cf.* MCM, *supra* note 8, pt. V, ¶ 4c(1) (G) (good cause required to deny a request for an open hearing).

[16] AR 27-10, *supra* note 2, para. 3-18*g*(2).

problems that could arise from public hearings before deciding to conduct nonjudicial punishment proceedings publicly before their units.

Initially, a commander must realize that an article 15 hearing is not a judicial forum. In most cases, the commander will lack legal training, the soldier will not be represented by counsel, and a judge advocate will not participate on behalf of the "prosecution." Consequently, the benefits of a public hearing could be outweighed by procedural irregularities, problems of decorum, and humiliation of the accused.[17]

If conducted regularly within a unit, public proceedings could chill requests for open hearings, as soldiers in the unit seek to avoid mass public scrutiny of their alleged misdeeds. The specter of a public hearing likewise could move accused soldiers to request "representation" at hearings by civilian attorneys or by military defense counsel.[18] Furthermore, a soldier faced with the threat of quasi-judicial public examination of his or her alleged misconduct well may decline nonjudicial punishment and demand trial by courts-martial.[19]

Conducting public hearings before a mass audience might raise serious questions about the impartiality of the nonjudicial punishment authority. If a hearing were conducted before unit personnel whom the commander had ordered to attend, the punishment authority might be moved—or appear to be moved—by collateral considerations of deterrence, rather than the merits of the case. Moreover, a nonjudicial punishment hearing frequently will pit the credibility of an NCO against that of the accused. This tension may induce the nonjudicial punishment authority to resolve reasonable doubts against the soldier to preserve the NCO's credibility as a leader. In either case, the underlying fairness of the proceedings could be undermined by the imposing authority's evident predisposition to conclude that the soldier engaged in the alleged misconduct, or to find the soldier guilty because of inappropriate, collateral concerns. Similarly, the propriety of the punishment could be questioned if the commander based the punishment on a desire to promote general deterrence, rather than other, appropriate considerations.

Alternatives to Public Hearings

A commander may obtain the benefits of public article 15 proceedings by less problematic means than compulsory open hearings. For example, a commander can publicize the results of article 15 hearings by announcing them at unit formations or by posting them on a unit bulletin board.[20] Of course, either mechanism must be used fairly and consistently. Moreover, when a commissioned officer or NCO receives nonjudicial punishment, the imposing officer should consider the impact that the publication of this information might have on that individual's continued ability to serve as a leader.[21]

Requiring soldiers to attend courts-martial is another means of enhancing deterrence and familiarizing the command with the military's judicial system. By watching a court-martial, a soldier can observe the military justice system—as well as the potential consequences of misconduct—in a controlled, judicial environment.

Finally, judge advocates actively should assist commanders with military justice training. This training can include mock article 15 proceedings, which should accomplish many of the benefits of having soldiers attend actual hearings without creating the risks that go with this practice.

Conclusion

Military law does not prohibit public nonjudicial punishment hearings before mass audiences. Public hearings may achieve substantial benefits—among them, promoting deterrence and enhancing respect for the command and the military justice system. Public hearings, however, also may create many problems—both actual and perceived. Accordingly, a commander should resort to public hearings only after careful consideration and consultation with his or her servicing judge advocate. When deciding whether to conduct public hearings, the commander should not overlook alternative means for enhancing respect and achieving deterrence. Major Milhizer.

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[17] *See generally* United States v. Cruz, 25 M.J. 326 (C.M.A. 1987) (so-called "Peyote Platoon" case).

[18] In the Army, trial defense counsel may not represent soldiers at article 15 hearings without prior approval of the Chief, Trial Defense Service. U.S. ARMY TRIAL DEFENSE SERV., U.S. ARMY LEGAL SERVS. AGENCY, TRIAL DEFENSE SERVICE STANDARD OPERATING PROCEDURES, para. 1-5*d* (1 Oct. 1985).

[19] *See* UCMJ art. 15(a).

[20] AR 27-10, *supra* note 2, para. 3-22.

[21] *Id.* para. 3-22*f*. Other pertinent factors the commander should consider before publicizing the results of nonjudicial punishment proceedings include the nature of the offense, the individual's military record and duty position, the deterrent effect of publication, the impact on unit morale or mission, and the impact on the victim. *Id.* para. 3-22*a* to *e*.

Professional Responsibility Notes

OTJAG Standards of Conduct Office

Ethical Awareness

The Standards of Conduct Office normally publishes summaries of ethical inquiries that have been resolved after preliminary screenings. These inquiries, which involve isolated instances of professional impropriety, poor communication, lapses in judgment, and similar minor failings, typically are resolved by counseling, admonition, or reprimand. More serious cases, on the other hand, are referred to The Judge Advocate General's Professional Responsibility Committee (PRC).

The following PRC opinion, which applies the Army's Rules of Professional Conduct for Lawyers[1] to an actual professional responsibility case, is intended to promote an enhanced awareness of professional responsibility issues and to serve as authoritative guidance for judge advocates. To stress education and to protect privacy, neither the identity of the office, nor the name of the subject will be published. Mr. Eveland.

Professional Responsibility Opinion No. 92-1

The Judge Advocate General's Professional Responsibility Committee

The Professional Responsibility Committee has reviewed the alleged violation [of the Army Rules of Professional Conduct for Lawyers (Army Rules)] by Ms. (formerly Captain) Z . . . .

The facts of this incident are essentially uncontested and are contained in admissions made by Ms. Z during the investigation.

a. To substantiate a claim she filed for china allegedly lost during shipment of her household goods from [one CONUS location] to [another], Ms. Z altered a sales receipt to reflect that she purchased the china from [a named store] for $1600. She submitted this false documentation with her claim.

b. To substantiate a claim she filed for jewelry allegedly lost during shipment of her hold baggage from the [United States] to [her overseas duty station], Ms. Z signed her husband's name to a statement indicating that he was present when the jewelry was packed. She submitted this statement, which appeared to have been signed by her husband, with her claim.

Once the basic facts were determined, the Committee considered Ms. Z's intent. Ms. Z stated that she had not intended to defraud the government; rather, she simply was trying to expedite the claims process. The committee found her explanations incredible for the following reasons:

a. Regarding the china, Ms. Z indicated that, because she did not have the original receipt for the china, she contacted her mother, who sent her a receipt from a particular store. Ms. Z further indicated that she assumed that this was the store from which she had purchased the china and that she filled in the receipt to reflect the description of the allegedly missing china. Several facts undermine this explanation: (1) she actually bought a figurine and a zebra skin rug from [that store]; (2) no evidence indicates that her mother was with her when she made those purchases; (3) Ms. Z offered no reasonable explanation why her mother would have the receipt to send to her; (4) confronted with evidence that the receipt she presented was erroneous, Ms. Z never attempted to present a correct receipt for the china; and (5) [Ms. Z's] husband initially stated he had not seen any china (although he later changed his story).

b. Regarding the statement that appeared to contain her husband's signature, Ms. Z indicated that she signed his name using a general power of attorney that she had received from him before leaving the United States. She never produced a copy of the power of attorney, however, and she presented the signature as her husband's, instead of signing the statement as her husband's "attorney in fact."

Based on those discrepancies, inconsistencies, and improbabilities, the Committee concluded that, when Ms. Z submitted the false documentation to substantiate her claims, she did so with the intent to defraud the government. This is a violation of articles 132 and 133 of the Uniform Code of Military Justice.[2]

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[1] *See* DEP'T OF ARMY, PAMPHLET 27-26, LEGAL SERVICE: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (31 Dec. 1987) [hereinafter DA PAM. 26-27]. When the opinion was published, *Department of the Army Pamphlet (DA Pam.) 27-26* was the controlling version of the Rules of Professional Conduct. On 1 June 1992, *Army Regulation 27-26* superceded *DA Pam. 27-26. See generally* DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).

[2] *See* UCMJ arts. 132-133 (1988).

Rule 8.4 of the Army Rules of Professional Conduct for Lawyers states in pertinent part:

> It is professional misconduct for a lawyer to:
>
> ....
>
> b. commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; [or]
>
> c. engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.[3]

Based on the factual conclusions stated above, the Committee has found reason to believe that Ms. Z engaged in such professional misconduct.

The Committee has determined that Ms. Z's conduct "raises a substantial question as to [her] honesty, trustworthiness, or fitness as a lawyer in other respects" under the provisions of rule 8.3 of the Army Rules of Professional Conduct for Lawyers.[4] Accordingly, the Committee recommends that a copy of the report of investigation be forwarded to her state bar association for any action it deems appropriate.

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[3]DA PAM. 27-26, *supra* note 1, rule 8.4.

[4]Rule 8.3 provides, in pertinent part, "A lawyer having knowledge that another lawyer has committed a violation of these Rules . . . that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall report such a violation pursuant to regulations promulgated by The Judge Advocate General." *Id.* rule 8.3 (a).

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Legal Research for Retirement Points

The Legal Assistance Division, Office of The Judge Advocate General (OTJAG) and the Legal Assistance Branch, Administrative and Civil Law Division, The Judge Advocate General's School (TJAGSA) have implemented a program in which Reserve Component (RC) judge advocates may earn retirement points by performing legal research. Currently, more than thirty United States Army Reserve (USAR) and Army National Guard (ARNG) judge advocates are participating in the program. Under this program, RC judge advocates review and revise existing state law summaries contained in one or more Legal Assistance Branch publications. The absence of an "X" on the chart below indicates a jurisdiction and publication in which assistance from a RC judge advocate is needed. Interested judge advocates may register for the program by completing part III of Department of the Army Form 7206-R, *Application to Perform Legal Assistance Work for Retirement Points and to be Listed in the JAGC Reserve Officer Legal Assistance Directory* (July 1992), and returning the form to Chief, Legal Assistance Division, DAJA-LA, The Pentagon, Room 2C463, Washington, D.C. 20310-2200.

		Publication Number							
Location	Number of Attorneys	261	262	263	265	268	272	273	274
Alabama	2	X	X	X	X	X	X	X	X
Alaska	0								
Arizona	0								
Arkansas	1				X				
California	3	X	X	X	X	X	X	X	
Colorado	0								
Connecticut	2	X	X		X	X	X	X	

Location	Number of Attorneys	Publication Number 261	262	263	265	268	272	273	274
Delaware	0								
District of Columbia	1	X	X	X	X		X	X	
Florida	1	X		X	X				
Georgia	1		X	X		X	X		
Guam	0								
Hawaii	2		X		X	X	X	X	
Idaho	0								
Illinois	1		X	X		X	X	X	
Indiana	0								
Iowa	1	X	X	X	X	X	X	X	X
Kansas	2		X	X	X		X		
Kentucky	0								
Louisiana	2			X					
Maine	0								
Maryland	1	X	X	X	X		X	X	
Massachusetts	1		X			X		X	
Michigan	1	X	X	X	X	X	X	X	X
Minnesota	0								
Mississippi	0								
Missouri	0								
Montana	0								
Nebraska	0								
Nevada	0								
New Hampshire	0								
New Jersey	0								
New Mexico	1	X	X	X	X	X	X	X	X
New York	2	X	X	X	X				
North Carolina	1	X	X	X	X	X	X	X	X
North Dakota	0								
Ohio	1		X	X			X	X	
Oklahoma	2	X	X		X	X	X	X	
Oregon	0								
Pennsylvania	0								
Puerto Rico	0								
Rhode Island	0								
South Carolina	1	X	X				X		
South Dakota	0								
Tennessee	0								

Location	Number of Attorneys	Publication Number 261	262	263	265	268	272	273	274
Texas	5	X	X	X	X	X	X	X	
Utah	0								
Vermont	0								
Virgin Islands	0								
Virginia	1	X	X	X	X		X	X	
Washington	0								
West Virginia	0								
Wisconsin	3	X	X	X	X	X	X	X	X
Wyoming	1	X	X		X	X	X	X	

Reserve Component Quotas for Resident Graduate Course

The Commandant, The Judge Advocate General's School, has announced that two student quotas in the 42d Judge Advocate Officer Graduate Course have been set aside for Reserve Component judge advocates. The forty-two-week, graduate-level course will be taught at The Judge Advocate General's School in Charlottesville, Virginia, from 2 August 1993 to 13 May 1994. Graduates will be awarded the degree of Master of Laws in Military Law. Any Reserve Component Judge Advocate General's Corps (JAGC) captain or major who will have at least four years of JAGC experience by 2 August 1993 is eligible to apply for a quota. An officer who has completed the Judge Advocate Officer Advanced Course, however, may *not* apply to attend the resident course. Each application packet must include the following materials:

1. Personal data: The applicant's full name (including the applicant's preferred name if other than first name), grade, date of rank, age, address, and telephone number (business, fax, and home).

2. Military experience: A chronological list of the applicant's Reserve Component and active duty assignments.

3. Awards and decorations: A list of the applicant's awards and decorations.

4. Military and civilian education: A list of the schools the applicant has attended and the degrees the applicant has obtained, along with dates of completion for each course of instruction and any honors the applicant has received. The applicant also must include his or her law school transcript.

5. Civilian experience: The applicant should include a resume describing his or her legal experience.

6. Statement of purpose: In one or two paragraphs, the applicant should state why he or she wants to attend the resident graduate course.

7. Letter of recommendation:

a. If the applicant is assigned to a United States Army Reserve (USAR) Troop Program Unit, he or she should include a letter of recommendation from his or her military law center commander or staff judge advocate.

b. If the applicant is a member of the Army National Guard (ARNG) he or she should include a letter of recommendation from his or her staff judge advocate.

c. If the applicant is a USAR individual mobilization augmentee (IMA), he or she should include a letter of recommendation from his or her staff judge advocate or proponent office.

8. Department of Army Form 1058 (for USAR applicants) or National Guard Bureau Form 64 (for ARNG applicants): The applicant must fill out the appropriate form and include it in the application packet.

Each applicant should forward his or her packet through appropriate channels, as described below:

1. If assigned to the ARNG, the applicant should forward the packet through the state chain of command to ARNG Operating Activity Center, ATTN: NGB-ARO-ME, Building E6814, Edgewood Area, Aberdeen Proving Ground, MD 21010-5420.

2. If assigned to a USAR Troop Program Unit (TPU) in the continental United States, the applicant should forward the packet through the chain of command of his or her Major United States Army Reserve Command to Commander, ARPERCEN, ATTN: DARP-OPS-JA, St. Louis, MO 63132-5200

3. If assigned to a USAR Control Group (IMA/Reinforcement) the applicant should send the packet to Commander, ARPERCEN, ATTN: DARP-OPS-JA, St. Louis, MO 63132-5200.

An application will not be considered unless it is received at the appropriate address not later than 15 December 1992.

Individuals selected to attend the course will be notified on or about 1 February 1993. An officer selected for attendance at the graduate course must be funded by the Army Reserve Personnel Center, the ARNG of his or her home state, or the Active Guard Reserve Management Directorate.

The Judge Advocate General's Continuing Legal Education (On-Site) Training

This note reflects the most recent information available at the time of publication for the training sites, dates, subjects, and local action officers for The Judge Advocate General's Continuing Legal Education (On-Site) Training Program for academic year 1993. Local action officers are reminded that copies of their on-site agenda are due at the Guard and Reserve Affairs Department not later than twenty-one days before their on-sites begin.

Questions concerning the On-Site Training Program should be directed to the appropriate local action officer. Any problem that an action officer or a unit commander cannot resolve should be directed to Major Mark Sposato, Chief, Unit Training and Liaison Office, Guard and Reserve Affairs Department, Office of The Judge Advocate General, Charlottesville, VA 22903-1781 (telephone (804) 972-6380, fax (804) 972-6386).

The Judge Advocate General's School Continuing Legal Education (On-Site) Training, AY 1993

Date	City, Host Unit, and Training Site	AC OG/RC GO Subject/Instructor/GRA Rep.		Action Officer
17-18 Oct 92	Minneapolis, MN 214th MLC Thunderbird Motor Hotel Bloomington, MN 55431	AC GO RC GO Crim Law Int'l Law GRA Rep	 BG Morrison MAJ O'Hare LCDR Rolph COL Curtis	LTC Randel I. Bichler 760 Seventh St. SW Wells, MN 56097 (507) 553-5021
24-25 Oct 92	Willow Grove, PA 79th ARCOM & 153d MLC Willow Grove Naval Air Station Air Force Auditorium Willow Grove, PA 19090	AC GO RC GO Ad & Civ Law Crim Law GRA Rep	 COL Cullen MAJ Jennings LTC Leclair Dr. Foley	LTC Robert C. Gerhard 619 Curtis Rd. Glenside, PA 19038 (215) 885-6780
14-15 Nov 92	New York, NY 77th ARCOM & 4th MLC Fordham Law School New York, NY 10023	AC GO RC GO Int'l Law Contract Law GRA Rep	 BG Morrison/COL Lassart MAJ Hudson MAJ Tomanelli COL Curtis	LTC John Greene 437 73d St. Brooklyn, NY 11209 (212) 264-0650
20-22 Nov 92	San Antonio, TX 90th ARCOM Sheraton Fiesta Hotel San Antonio, TX 78216	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	 COL Lassart MAJ Comodeca LTC Jones LTC Menk	CPT William Hintze HQ, 90th ARCOM 1920 Harry Wurzbach Hwy. San Antonio, TX 78209-1598 (512) 221-5164
8-10 Jan 93	Long Beach, CA 78th MLC Long Beach Marriott Long Beach, CA 90815	AC GO RC GO Crim Law Int'l Law GRA Rep	 BG Morrison MAJ Tate LCDR Rolph COL Curtis	MAJ John C. Tobin Chapman, Fuller & Bollard 2010 Main St. Suite 400 Irvine, CA 92714 (714) 752-1455

The Judge Advocate General's School Continuing Legal Education (On-Site) Training, AY 1993 (Con't)

Date	City, Host Unit, and Training Site	AC OG/RC GO Subject/Instructor/GRA Rep.		Action Officer
23-24 Jan 93	Fort Sheridan, IL 96th JAG Det. Port of Call Club Bldg. 140 U.S. Naval Training Center Great Lakes, IL 60088	AC GO RC GO Int'l Law Crim Law GRA Rep	 COL Lassart MAJ Myhre MAJ O'Hare MAJ Sposato	LTC Timothy Hyland Bldg. 82 Fort Sheridan, IL 60037 (708) 926-3821
30-31 Jan 93	Seattle, WA 6th MLC University of Washington Law School Seattle, WA 98105	AC GO RC GO Int'l Law Contract Law GRA Rep	 COL Cullen MAJ Warner LTC Dorsey LTC Hamilton	MAJ Mark Reardon 6th MLC 4505 36th Ave. W Seattle, WA 98199-5099 (206) 281-3002
5-7 Feb 93	New Orleans, LA LA ARNG/2d MLC Clarion Hotel 1500 Canal St. New Orleans, LA 70112	AC GO RC GO Ad & Civ Law Ad & Civ Law GRA Rep	 BG Morrison LTC McFetridge MAJ Pearson LTC Menk	LTC James J. Donelon HQ, STARC Louisiana ARNG AGO Bldg., Jackson Barracks New Orleans, LA 70146-0330 (504) 278-6228 DSN: 485-8228
27-28 Feb 93	Salt Lake City, UT 87th MLC Olympus Hotel 6000 Third St. W Salt Lake City, UT 84114	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 COL Lassart MAJ Wilkins MAJ Connor LTC Menk	LTC Ernie Jones 87th MLC, Bldg. 100 Douglas AFRC Salt Lake City UT 84114 (801) 363-7900 (main Office) (801) 531-4116 (direct)
27-28 Feb 93	Denver, CO 120th JAG Det HQ, Colorado National Guard 6848 South Revere Parkway Englewood, CO 80112	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 COL Lassart MAJ Wilkins MAJ Connor MAJ Sposato	LTC Patrick W. Buckingham 730 North Weber Suite 101 Colorado Springs, CO 80903 (719) 635-0903
6-7 Mar 93	Columbia, SC 120th ARCOM University of South Carolina Law School Columbia, SC 29208	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 COL Lassart MAJ Hunter MAJ Emswiler LTC Hamilton	MAJ Robert H. Uehling 209 South Springs Rd. Columbia, SC 29226 (803) 733-2878
13-14 Mar 93	Washington, D.C. 10th MLC NWC (Arnold Auditorium) Fort McNair Washington, D.C. 20319	AC GO RC GO Int'l Law Contract Law GRA Rep	 COL Lassart MAJ Johnson MAJ Melvin MAJ Sposato	CPT Jordan E. Tannenbaum 4122 Nomis Drive Fairfax, VA 22032 (202) 687-1023
20-21 Mar 93	Burlington, MA 94th ARCOM Days Inn Burlington, MA 01803	AC GO RC GO Int'l Law Contract Law GRA Rep	 COL Cullen MAJ Warner MAJ Killham Dr. Foley	COL Gerald D'Avolio SJA, HQ, 94th ARCOM ATTN: AFKA-ACC-JA AFRC, Bldg. 1607 Hanscom AFB, MA 01731 (617) 523-4860

The Judge Advocate General's School Continuing Legal Education (On-Site) Training, AY 1993 (Con't)

Date	City, Host Unit, and Training Site	AC OG/RC GO Subject/Instructor/GRA Rep.		Action Officer
27-28 Mar 93	Fort Wayne, IN 123d ARCOM Marriott Hotel Fort Wayne, IN 46818	AC GO RC GO Ad & Civ Law Crim Law GRA Rep	 COL Lassart MAJ Peterson MAJ Burrell LTC Hamilton	MAJ Byron N. Miller 200 Tyne Road Louisville, KY 40207 (502) 587-3400
3-4 Apr 93	San Francisco, CA 5th MLC 6th Army Conference Rm, Bldg. 35 Presidio of San Francisco CA 94129	AC GO RC GO Crim Law Int'l Law GRA Rep	 COL Cullen MAJ Borch MAJ Johnson COL Curtis	COL David Schreck 50 Westwood Drive Kentfield, CA 94904 (415) 557-3030
17-18 Apr 93	Fort Lauderdale, FL 174th MLC Deerfield Beach Resort 950 SE 20th Ave. (A1A) Deerfield Beach, FL 33441	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	 COL Cullen MAJ Bowman MAJ Cameron Dr. Foley	MAJ John J. Copelan, Jr. Broward County Attorney's Office 115 South Andrews Ave. Suite 423 Fort Lauderdale, FL 33301 (305) 357-7600
30 Apr- 2 May 93	St. Louis, MO 102d ARCOM Sheraton West Port Plaza St. Louis, MO 63146	AC GO RC GO Int'l Law Int'l Law GRA Rep	 COL Lassart MAJ Hudson MAJ Johnson MAJ Sposato	MAJ Robert Mast 102d ARCOM ATTN: AFRC-AMO-JA 4301 Goodfellow Blvd. St. Louis, MO 63120 (314) 263-3153/3319
15-16 May 93	Columbus, OH OH ARNG/83d ARCOM Lennox Inn Columbus, OH 43216	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 BG Morrison MAJ Jacobson MAJ Hancock MAJ Menk	LTC Thomas G. Schumacher 762 Woodview Drive Edgewood, KY 41017 (606) 341-2862
21-23 May 93	Gulf Shores, AL 121st ARCOM/ALARNG Gulf State Park Resort Hotel Gulf Shores, AL 36547	AC GO RC GO Ad & Civ Law Crim Law GRA Rep	 BG Morrison MAJ Hostetter MAJ Hayden LTC Hamilton	MAJ Dana H. Wendt 121st ARCOM 255 W. Oxmoor Road Birmingham, AL 35209-6383 (205) 940-9304

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.**

Active duty service members must obtain quotas through their directorates of training, or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1992

30 November-1 December: 1st Basic Procurement Fraud Course (5F-F36).

30 November-4 December: 14th Operational Law Seminar (5F-F47).

7-11 December: 42d Federal Labor Relations Course (5F-F22).

1993

4-6 January: 1993 USAREUR Tax CLE (5F-F28E).

4-8 January: 115th Senior Officers' Legal Orientation (5F-F1).

6-9 January: 1993 USAREUR Legal Assistance CLE (5F-F23E).

11-15 January: 1993 Government Contract Law Symposium (5F-F11).

11-15 January: 1993 PACOM Tax CLE (5F-F28P).

19 January-26 March: 130th Basic Course (5-27-C20).

1-5 February: 30th Criminal Trial Advocacy Course (5F-F32).

1-5 February: 1993 USAREUR Contract Law CLE (5F-F15E).

8-12 February: 116th Senior Officers' Legal Orientation (5F-F1).

22 February-5 March: 130th Contract Attorneys' Course (5F-F10).

8-12 March: 32d Legal Assistance Course (5F-F23).

15-19 March: 53d Law of War Workshop (5F-F42).

22-26 March: 17th Administrative Law for Military Installations Course (5F-F24).

29 March-2 April: 5th Installation Contracting Course (5F-F18).

5-9 April: 4th Law for Legal NCOs Course (512-71D/E/20/30).

12-16 April: 117th Senior Officers' Legal Orientation (5F-F1).

12-16 April: 15th Operational Law Seminar (5F-F47).

20-23 April: Reserve Component Judge Advocate Annual CLE Workshop (5F-F56).

26 April-7 May: 131st Contract Attorneys' Course (5F-F10).

17-21 May: 36th Fiscal Law Course (5F-F12).

17 May-4 June: 36th Military Judges' Course (5F-F33).

18-21 May: 1993 USAREUR Operational Law CLE (5F-F47E).

24-28 May: 43d Federal Labor Relations Course (5F-F22).

7-11 June: 118th Senior Officers' Legal Orientation (5F-F1).

7-11 June: 23d Staff Judge Advocate Course (5F-F52).

14-25 June: JAOAC, Phase II (5F-F58).

14-25 June: JATT Team Training (5F-F57).

14-18 June: 4th Legal Administrators' Course (7A-550A1).

14-16 July: 24th Methods of Instruction Course (5F-F70).

19 July-24 September: 131st Basic Course (5-27-C20).

19-30 July: 132d Contract Attorneys' Course (5F-F10).

2 August 1993-13 May 1994: 42d Graduate Course (5-27-C22).

2-6 August: 54th Law of War Workshop (5F-F42).

9-13 August: 17th Criminal Law New Developments Course (5F-F35).

16-20 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

23-27 August: 119th Senior Officers' Legal Orientation (5F-F1).

30 August-3 September: 16th Operational Law Seminar (5F-F47).

20-24 September: 10th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

January 1993

4-8: UMLC, 27th Annual Philip Heckerling Institute on Estate Planning, Miami Beach, FL.

11-14: SLF, Environmental Law for the Oil & Gas Lawyer, Dallas, TX.

11-15: GWU, Formation of Government Contracts, Washington, D.C.

16-19: SLF, Practicing Business Bankruptcy, Dallas, TX.

24-28: NCDA, Criminal Investigator Course, Reno, NV.

For further information on a civilian course, please contact the institution offering the course. The addresses are in the August 1992 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
**Alabama	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
*California	1 February annually
Colorado	Any time within three-year period
Delaware	31 July biennially
**Florida	Assigned month every three years
Georgia	31 January annually
Idaho	Every third anniversary of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
**Louisiana	31 January annually
Michigan	31 March annually
Minnesota	30 August every third year
**Mississippi	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Mexico	30 days after completing each CLE program
**North Carolina	28 February annually
North Dakota	31 July annually
*Ohio	Every two years by 31 January
**Oklahoma	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter every three years
**Pennsylvania	Annually as assigned
**South Carolina	15 January annually
*Tennessee	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June biennially
*Wisconsin	20 January biennially
Wyoming	30 January annually

For addresses and detailed information, see the July 1992 issue of *The Army Lawyer*.

*Military exempt
**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A239203 Government Contract Law Deskbook, vol. 1/JA-505-1-91 (332 pgs).

AD A239204 Government Contract Law Deskbook, vol. 2/JA-505-2-91 (276 pgs).

AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

AD A248421 Real Property Guide—Legal Assistance/JA-261-92 (308 pgs).

AD B147096 Legal Assistance Guide: Office Directory/ JA-267-90 (178 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

AD A228272 Legal Assistance: Preventive Law Series/ JA-276-90 (200 pgs).

AD A246325 Soldiers' and Sailors' Civil Relief Act/JA-260(92) (156 pgs).

AD A244874 Legal Assistance Wills Guide/JA-262-91 (474 pgs).

AD A244032 Family Law Guide/JA 263-91 (711 pgs).

AD A241652 Office Administration Guide/JA 271-91 (222 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A241255 Model Tax Assistance Guide/JA 275-91 (66 pgs).

AD A246280 Consumer Law Guide/JA 265-92 (518 pgs).

AD A245381 Tax Information Series/JA 269/92 (264 pgs).

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

*AD A255038 Defensive Federal Litigation/JA-200(92) (840 pgs).

AD A236663 Reports of Survey and Line of Duty Determinations/JA 231-91 (91 pgs).

*AD A255064 Government Information Practices/JA-235(92) (326 pgs).

AD A237433 AR 15-6 Investigations: Programmed Instruction/JA-281-91R (50 pgs).

Labor Law

AD A239202 Law of Federal Employment/JA-210-91 (484 pgs).

AD A236851 The Law of Federal Labor-Management Relations/JA-211-91 (487 pgs).

Developments, Doctrine, & Literature

*AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs.)

Criminal Law

AD B100212	Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).
AD B135506	Criminal Law Deskbook Crimes & Defenses/ JAGS-ADC-89-1 (205 pgs).
AD B137070	Criminal Law, Unauthorized Absences/ JAGS-ADC-89-3 (87 pgs).
AD A251120	Criminal Law, Nonjudicial Punishment/JA-330(92) (40 pgs).
AD A251717	Senior Officers' Legal Orientation/JA 320(92) (249 pgs).
AD A251821	Trial Counsel & Defense Counsel Handbook/ JA 310(92) (452 pgs).
AD A233621	United States Attorney Prosecutors/JA-338-91 (331 pgs).

Guard & Reserve Affairs

AD B136361	Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966	USACIDC Pam. 195-8, Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam. 25-33.)

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.

(*2*) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series

forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam. 25-33.

If your unit does not have a copy of DA Pam. 25-33, you may request one by calling the Baltimore USAPDC at (301) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 30-21	Food Program, Interim Change I01	1 Jul 92
AR 40-12	Quarantine Regulations of the Armed Forces	24 Jan 92
AR 405-16	Homeowners' Assistance Program	12 Jun 92
AR 600-8-23	Standard Installation-Division Personnel System (SIDPERS) Database Management	1 Mar 92
AR 630-10	Absence Without Leave, Desertion, and Administration of Personnel Involved in Civilian Court Proceedings	10 Jun 92
AR 710-3	Asset and Transaction Reporting System	15 May 92
AR 840-1	Department of the Army Seal, Department of the Army Emblem, and Branch of Service Plaques	2 Apr 92
PAM 750-43	Army Test Program Set Procedures	28 Feb 92
UPDATE 22	Reserve Component Personnel Update, Interim Change I03	

3. LAAWS Bulletin Board Service

a. Numerous publications produced by The Judge Advocate General's School (TJAGSA) are available through the LAAWS Bulletin Board System (LAAWS BBS). Users can sign on the LAAWS BBS by dialing commercial (703) 693-4143, or DSN 223-4143, with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions. It then will instruct them that they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

b. *Instructions for Downloading Files From the LAAWS Bulletin Board Service.*

(1) Log on the LAAWS BBS using ENABLE 2.15 and the communications parameters described above.

(2) If you never have downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

(c) Once you have joined the Automation Conference, enter [d] to Download a file.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(f) The system will respond by giving you data such as download time and file size. You then should press the F10 key, which will give you a top-line menu. From this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(g) The menu will then ask for a file name. Enter [c:\pkz110.exe].

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when the file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression and decompression utilities used by the LAAWS BBS.

(3) To download a file after logging on to the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c below.

(c) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, type F10. From the top-line menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(e) When asked to enter a file name, enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. When you hear a beep, file transfer is complete and the file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it on ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

c. *TJAGSA Publications Available Through the LAAWS BBS.*

The following is an updated list of TJAGSA publications available for downloading from the LAAWS BBS. (Note that the date a publication is "uploaded" is the month and year the file was made available on the BBS—the publication date is available within each publication.)

FILE NAME	UPLOADED	DESCRIPTION
121CAC.ZIP	June 1990	The April 1990 Contract Law Deskbook from the 121st Contract Attorneys' Course
1990_YIR.ZIP	January 1991	1990 Contract Law Year in Review in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA.
1991_YIR.ZIP	January 1992	TJAGSA Contract Law 1991 Year in Review
505-1.ZIP	June 1992	TJAGSA Contract Law Deskbook, vol. 1, May 1992
505-2.ZIP	June 1992	TJAGSA Contract Law Deskbook, vol. 2, May 1992

FILE NAME	UPLOADED	DESCRIPTION
506.ZIP	November 1991	TJAGSA Fiscal Law Deskbook, November 1991
ALAW.ZIP	June 1990	*The Army Lawyer* and *Military Law Review* Database (ENABLE 2.15). Updated through 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
CCLR.ZIP	September 1990	Contract Claims, Litigation, & Remedies
FISCAL90.ZIP	November 1990	The December 1990 Fiscal Law Deskbook
JA200A.ZIP	August 1992	Defensive Federal Litigation, vol. 1
JA200B.ZIP	August 1992	Defensive Federal Litigation, vol. 2
JA210.ZIP	March 1992	Law of Federal Employment
JA211.ZIP	August 1992	Law of Federal Labor-Management Relations
JA231.ZIP	March 1992	Reports of Survey and Line of Duty Determinations—Programmed Text
JA235.ZIP	March 1992	Government Information Practices
JA241.ZIP	March 1992	Federal Tort Claims Act
JA260.ZIP	September 1992	Soldiers' and Sailors' Civil Relief Act Pamphlet
JA261.ZIP	March 1992	Legal Assistance Real Property Guide
JA262.ZIP	March 1992	Legal Assistance Wills Guide
JA267.ZIP	March 1992	Legal Assistance Office Directory
JA268.ZIP	March 1992	Legal Assistance Notarial Guide
JA269.ZIP	March 1992	Federal Tax Information Series
JA271.ZIP	March 1992	Legal Assistance Office Administration Guide
JA272.ZIP	March 1992	Legal Assistance Deployment Guide
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References
JA275.ZIP	March 1992	Model Tax Assistance Program
JA276.ZIP	March 1992	Preventive Law Series
JA285.ZIP	March 1992	Senior Officers' Legal Orientation
JA290.ZIP	March 1992	SJA Office Manager's Handbook
ND-BBS.ZIP	July 1992	TJAGSA Criminal Law New Developments Course Deskbook
JA301.ZIP	July 1992	Unauthorized Absence—Programmed Instruction, TJAGSA Criminal Law Division
JA310.ZIP	July 1992	Trial Counsel and Defense Counsel Handbook, TJAGSA Criminal Law Division
JA320.ZIP	July 1992	Senior Officers' Legal Orientation Criminal Law Text
JA330.ZIP	July 1992	Nonjudicial Punishment —Programmed Instruction, TJAGSA Criminal Law Division
JA337.ZIP	July 1992	Crimes and Defenses Handbook **(DOWNLOAD ON HARD DRIVE ONLY.)**
JA421.ZIP	May 1992	Operational Law Handbook, vol. 1
JA422.ZIP	May 1992	Operational Law Handbook, vol.2
YIR89.ZIP	January 1990	Contract Law Year in Review—1989

Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMAs) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, a request from an IMA must contain a statement that verifies that the IMA needs the requested publications for purposes related to the military practice of law. Questions or suggestions concerning the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crankc(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via autovon should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System.

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are autovon 274-7115, ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

b. The following materials have been declared excess and are available for redistribution. Please contact the libraries directly at the addresses provided below.

1. CW3 Gary Dodge, Office of the Staff Judge Advocate, U.S. Military Academy, West Point, NY 10996; telephone (914) 938-2781/4570.

United States Code Service, 192 vols.

2. SSG Frederick J. Dalton, Headquarters, U.S. Army Garrison, Fort Indiantown Gap, Annville, PA 17003-5011; telephone (717) 865-5444, ext. 2552.

Purdon's Pennsylvania Statutes Annotated—current set
West's Military Justice Reporter, vols. 1-30

3. Cheryl Fields, U.S. Army Chemical Research, Development and Engineering Center, Edgewood Arsenal, Bldg. E-4435, Aberdeen Proving Ground, MD 21010; telephone: (410) 671-1288/2289.

Decisions of the Comptroller General of the United States, paper edition.

Volume	Date	Pages
69	Apr. 1990	359-432
	July 1990	549-641
	Sept. 1990	691-758
70	Oct. 1990	1-52
	Nov. 1990	53-113
	Dec. 1990	115-164
	Jan. 1991	165-224
	Feb. 1991	225-312
	Mar. 1991	313-389
	Apr. 1991	389-458
	May 1991	459-539
	June 1991	541-605
	July 1991	607-660
	Aug. 1991	661-698
	Sept. 1991	699-737
71	Oct. 1991	1-54
	Nov. 1991	55-96

U.S. Postal Service

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Headquarters, Department of the Army, Washington, D.C. 20310

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Captain Benjamin T. Kash, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781

7. Owner *(If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding 1 percent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a partnership or other unincorporated firm, its name and address, as well as that of each individual must be given. If the publication is published by a nonprofit organization, its name and address must be stated.) (Item must be completed.)*

Full Name	Complete Mailing Address
Headquarters, Department of the Army	Washington, D.C. 20310

8. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages or Other Securities *(If there are none, so state)*

Full Name	Complete Mailing Address
None	

9. For Completion by Nonprofit Organizations Authorized To Mail at Special Rates *(DMM Section 423.12 only)*
The purpose, function, and nonprofit status of this organization and the exempt status for Federal income tax purposes *(Check one)*

☐ (1) Has Not Changed During Preceding 12 Months

☐ (2) Has Changed During Preceding 12 Months

(If changed, publisher must submit explanation of change with this statement.)

10. Extent and Nature of Circulation *(See instructions on reverse side)*	Average No. Copies Each Issue During Preceding 12 Months	Actual No. Copies of Single Issue Published Nearest to Filing Date
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B. Paid and/or Requested Circulation 1. Sales through dealers and carriers, street vendors and counter sales	0	0
2. Mail Subscription *(Paid and/or requested)*	200	200
C. Total Paid and/or Requested Circulation *(Sum or 10B1 and 10B2)*	200	200
D. Free Distribution by Mail, Carrier or Other Means Samples, Complimentary, and Other Free Copies	7535	7535
E. Total Distribution *(Sum of C and D)*	7735	7735
F. Copies Not Distributed 1. Office use, left over, unaccounted, spoiled after printing	88	53
2. Return from News Agents	0	0
G. TOTAL *(Sum of E, F1 and 2—should equal net press run shown in A)*	7823	7790

11. I certify that the statements made by me above are correct and complete

Signature and Title of Editor, Publisher, Business Manager, or Owner

Editor

PS Form **3526**, Dec. 1987

By Order of the Secretary of the Army:

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